86-1901

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

vs.

STATE OF CALIFORNIA, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

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QUESTIONS PRESENTED

The court below, implementing an earlier interim decision by the California Supreme Court, held that the public trust servitude applied to the bed of Lake Tahoe between low and high water marks.[1] The California Supreme Court relied on *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892) ("*Illinois Central*"), stating that *Illinois Central* "settled the issue." This was a sudden and unpredictable change, without precedent in state property law. However, the court reasoned that "public interest" in protecting the environment and "preserving" the shorezone on California lakes and rivers justified its drastic change in California law.

Petitioner's appeal from the subsequent adverse trial court ruling, following remand by the Californnia Supreme Court, resulted in yet another unprecedented and unpredictable change in well established California law, the court below holding that, since *1971*, the public trust servitude extended up to an artificial high water mark. The court supported its ruling with the theory of "prescriptive rights" which it said created a public trust in the *state* based on the periodic flooding of petitioners' property, for water storage, by the operation of the *federal* dam from *1966* to *1971*. There had been no notice to shoreline owners of any adverse claim to their property until immediately prior to the commencement of this litigation in 1977.

The following questions are presented:

I. Does the decision in *Illinois Central:*

a. Constitute a rule of federal common law, binding on states, rendering the states "powerless"[2] to convey

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[1] The earlier California Supreme Court decisions in this litigation leading up to the final judgment were: *State of California v. Superior Court (Fogerty I),* 29 Cal.3d 240 (1981) and the companion case of *State of California v. Superior Court (Lyon),* 29 Cal.3d 210, (1981).

[2] In *Lyon* the California Supreme Court ruled that *Illinois Central* stood for the proposition that a state was "powerless to relinquish its rights as trustee." (*Lyon, supra* at 227.)

sovereign lands free of the burden of the public trust servitude as defined by the California Supreme Court?

b. Support a state court ruling changing, unpredictably and without precedent, well-settled state law and transferring ownership of property to the state without payment, where the public trust servitude is involved, without regard to the Due Process and Taking Clauses of the Constitution?

c. Support a state court ruling that a state has a public trust servitude in any land above the ordinary high water mark of the bed of a navigable lake as that mark existed at statehood where the state had never owned the land above that mark?

II. Does a sudden, unprecedented and unpredictable change in state law, which terminates vested property rights and destroys the reasonable investment expectations of owners constitute a taking of private property without payment in violation of the Fifth and Fourteenth Amendments?

a. Does a state court's concept of what is in the "public interest" or the "best public policy" override constitutional protections when a state court transfers private property to the state by judicial decision?

b. Are state courts, as well as the legislative and executive branches, constitutionally prohibited from "taking" property for the state without the payment of just compensation?

III. Can a state court hold, consistent with due process guarantees, that:

a. The public trust servitude can be imposed on shoreline owners' previously unencumbered property under a prescriptive rights theory where the owners had no prior notice of such an adverse claim?

b. The flooding of private lakefront land above the natural high water mark of a navigable lake by a federal dam creates, in the state, the public trust servitude in the land periodically flooded?

PARTIES

Petitioner is Tahoe Shorezone Representation, a non-profit corporation of Lake Tahoe shoreline owners, including both California and Nevada sides of Lake Tahoe. Tahoe Shorezone Representation has no parent or subsidiary corporations or affiliates.[1]

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[1] Respondents are State of California, State Lands Commission of the State of California, and Does I through X, inclusive. Additional Real Parties in Interest below, also Petitioners here, are: Charles F. Fogerty, Stella Fogerty, Russell S. Grove, Harold E. Ebright, Jr., Katherine Ebright, George Hilton Edmundson, Janet Louise Edmundson, Laurence L. Lindsey, Jr., Rosemary F. Lindsey, Homer M. Hayward, Reid W. Dennis, and Tahoe Meadows, a California corporation.

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OPINIONS BELOW

The opinion of the California Court of Appeal, Third Appellate District, in *Fogerty v. State of California* ("*Fogerty II*"), is reported at 187 Cal.App.3d 224; 231 Cal.Rptr. 810 (1986) (Appendix A); the opinion of the California Supreme Court in *State of California v. Superior Court* ("*Fogerty I*") is reported at 29 Cal.3d 240, 625 P.2d 256, and 172 Cal.Rptr. 713 (1981), cert. denied 454 U.S. 865 (1981) (Appendix C); the opinion of the California Supreme Court in *State of California v. Superior Court* ("*Lyon*") is reported at 29 Cal.3d 210, 625 P.2d 239, and 172 Cal.Rptr. 696 (1981) cert. denied 454 U.S. 865 (1981) (Appendix D).

JURISDICTION

The opinion of the Court of Appeal, *Fogerty II*, was entered on November 24, 1986. A timely petition for review was denied by the California Supeme Court on March 4, 1987. This Petition for

Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

The federal issues have been raised and argued at all levels of this litigation below. For example, see Court of Appeal (*Fogerty II*) opinion at 232-233, f.n. 3 and 5, App. A at A-5-7, and California Superior Court order of April 11, 1985, App. B at A-20. Petitioner also raised the issues before the California Supreme Court in its recently rejected petition for review of the Court of Appeal decision under the headings "Littoral Owners At Lake Tahoe Had No Notice of the State's Adverse Use" and "If the Decision of the Court of Appeal is Allowed to Stand an Unconstitutional Taking of Private Property Rights Will Result."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 830 of the California Civil Code provides:

> Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is not tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

STATEMENT OF THE CASE

This litigation between shoreline owners at Lake Tahoe and the State of California commenced in 1977 and has, in this same proceeding, resulted in three trial court decisions, two Court of Appeal decisions, one California Supreme Court decision, and a denial of review by the California Supreme Court of the California Court of Appeal decision on March 4, 1987.

Three California statutes enacted over 100 years ago and a number of court decisions, both federal and state, have consistently recognized that the California owner of the adjoining land held fee simple absolute title to the ordinary low water mark of a navigable lake or river and the state was the owner of the bed below that point. The state made no claim otherwise until 1977. That 1977 claim by the state resulted in the decisions in *Fogerty I*, *Lyon* and *Fogerty II*. The original 1977 claim by the state was to fee title up to the artificial high water mark and the additional claim that, if it did not have fee title, the property was nonetheless subject to the *Illinois Central*[1] public trust.

An earlier (1971) California supreme court decision had expanded, without precedent, the restrictions on owners of tidelands under the "tidelands trust" and thereby increased the drastic impact on the rights of shoreline owners when it was suddenly, unpredictably and without precedent, imposed by that court on the Lake Tahoe shoreline in 1981. Prior to that decision in *Marks v. Whitney*, 6 Cal.3d 251 (1971), the tidelands trust, as accepted in California and described in California decisions, protected the traditional "commerce, navigation and fisheries." In *Marks v. Whitney* the California court greatly expanded the scope of the tidelands trust by adding "the right to hunt" and for "general recreational purposes" and also concluded that "one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for bird and marine life,

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[1] *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892). ("*Illinois Central*".)

and which favorably affect the scenery and climate of the area."[2] *Id.* at 259-260. The court further stated that it is "not necessary to here define precisely all the public uses which encumber tidelands." *Id.* at 260. These restrictions are totally inconsistent and incompatible with the normal use of private residential property on the shoreline of Lake Tahoe.[3]

Consequently, in 1977, when the California Attorney General advised the State Lands Commission to ignore all the previous precedent and record claims to navigable rivers and lakes with respect to both fee ownership of the additional upland property claimed and to a "common law public trust for commerce, navigation and fisheries" it was a significantly different "public trust" than had existed prior to *Marks v. Whitney, supra.*[4]

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[2] The critical analysis in the Note, *Lyon* and *Fogerty: Unprecedented Extensions of the Public Trust,* 70 Cal. L. Rev. 1138, 1149-1150 (1982), says it well: "In *Marks v. Whitney,* trust purposes were expanded to include environmental protection . . . Once the focus of the trust shifted from commercial navigation to recreational, aesthetic, and ecological concerns, shorezones became as important to the state as tidelands. The *Marks v. Whitney* rationale for protecting the tidelands environment applies equally well to the shorezones. *By expanding the range of trust purposes for the tidelands trust, the California Supreme Court paved the way for the Lyon decision to subject the shorezones to the public trust* . . ." (Emphasis ours.)

[3] Many of the hundreds of homes located on the shore of the California side of Lake Tahoe also have piers, boat houses and other water-related structures for the private use and enjoyment of the owners and their guests. Many of the lakefront homeowners have chosen to maintain the balance of the lake-facing portion of their lakefront property in a relatively unimproved state with landscaping and open beaches rather than structures. However, all the owners and residents of these lakeside properties have protected and enjoyed the privacy and security of their private ownership and have exercised their rights as owners to "exclude others" from all of their private property including the land involved in this proceeding.

[4] Nine years after *Marks v. Whitney,* in *City of Berkeley v. Superior Court,* 26 Cal.3d 515, (1980), cert. denied 449 U.S. 840 (1980), but prior to *Fogerty I* and *Lyon,* the California Supreme Court ruled that the

The California Attorney General advised the State Lands Commission to make the claim for the first time in California history that:

> "1. In general, the State of California's sovereign ownership of the lands underlying navigable lakes and non-tidal, navigable rivers extends landward to the ordinary high-water mark.
>
> "2. Irrespective of whether State's title to such land extends landward to that line or merely to the ordinary low-water mark, the strip of lands between the two lines is subject to the common-law public trust for commerce, navigation and fisheries."

Petitioners immediately filed suit alleging violation of Fifth and Fourteenth Amendment rights if the claims were upheld. A temporary restraining order was issued preventing the state from recording these claims. The state based its claim to the "common-law public trust" on *Illinois Central*. The trial court granted a preliminary injunction against the state, which was upheld by the court of appeal in an unpublished opinion.[5]

On subsequent motions for summary judgment the owners' shoreline property rights were again confirmed: The trial court ruled:

> "1. That no portion of the subject property landward of the last natural low water mark of Lake Tahoe is, or ever was, sovereign property of the State of California; and
>
> "2. That no portion of the subject property landward of the last natural low water mark of Lake Tahoe is, or ever

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area between high and low tide was subject to the "tidelands trust" even though the property affected had been granted to private owners many years before, free of the "tidelands trust", pursuant to an 1870 legislative act. The Court overruled earlier decisions to the contrary and cited *Illinois Central* in support of that reversal of well-established California property law. (As in *Marks v. Whitney, supra,* neither Lake Tahoe shoreline owners nor the owners of any other shoreline property fronting on lakes and rivers in California were parties to the litigation.)

[5] See App. H, A-77, *et seq.*

was, subject to the common law public trust for commerce, navigation and fisheries."

On its second "appeal" from an unfavorable trial court ruling the state requested the California Supreme Court to exercise original jurisdiction (mandamus). The state's attempt to by-pass the court of appeal was successful. The supreme court accepted the matter and thereafter rejected the estoppel, *stare decisis* and constitutional arguments of petitioners. Although the court denied the state's request that it be awarded fee title up to an undefined high water mark, substantially the same result[6] was accomplished by the court imposing the public trust servitude on the shorezone of "all the navigable lakes and rivers in California."[7] (*Fogerty I, supra*, at 247) (App. C at A-28.)

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[6] As recently observed, referring to the "public trust easement" in California: "Although the landowner retains legal title to the property, he controls little more than naked fee . . . ." (*Summa Corp. v. Calif. ex rel. Lands Comm'n.*, 466 U.S. 198, 205 (1984).

[7] Again, there was no representation in the litigation of the affected owners of all the other shoreline which the court described as "4,000 linear miles along all navigable lakes and rivers in California" including "34 navigable lakes and 31 navigable rivers."

The California State Lands Commission ("Commission") described these 34 lakes and 31 rivers as "navigable" in a 1972 list. However, the navigabliity of these other lakes and rivers was not an issue in the *Fogerty* or *Lyon* litigation in spite of the court's *sua sponte* statement. Furthermore, the record does not furnish any basis of such an assumption. In fact, the question of navigability is the primary issue in litigation by shoreline owners at Donner Lake against the state. Donner Lake, near Lake Tahoe in the crest of the Sierra, is a lake some two and a half miles long and half mile wide which has no useful purpose as a "highway of commerce," but is nonetheless included as one of the "navigable lakes" in the Commission list. A motion for summary judgment by the state, asserting that Donner Lake was navigable for title purposes as a matter of law, was denied by the trial court. That litigation is still pending, presumably awaiting the outcome of this litigation since the state is now asserting in the Donner Lake litigation that the *Fogerty I* "public trust" will likewise apply at Donner Lake, whether or not it is navigable, or ever was sovereign property of the state. (*Brandenburger v. State*, No. 21947, Superior Court, County of Nevada, Mar. 1977.) (In

There was no previous California law even suggesting the "tidelands trust" burdened the shorelines of California's navigable lakes and rivers.[8] The court brushed aside the lack of precedent and the "failure of the state to previously assert its trust rights in the lands below high water" (*Lyon,* at 231; App. D, at A-61), citing *Illinois Central* as the basis for this drastic reversal of California property law:

> "... In our view, *Illinois Central Railroad Company. v. Illinois* (1892) 146 U.S. 387, which we described in *City of Berkeley* as the 'seminal case on the scope of the public trust doctrine' (26 Cal.3d at p. 521), settled the issue ..." (*Lyon* at 227; App. D at A-55.)[9]

All the historical evidence was in marked contrast to what the court ruled. In addition to the general community recognition of the complete ownership of the shorezone by the riparian owners

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National Audubon Society v. Superior Court, 33 Cal.3d 419 (1983), cert. denied, 464 U.S. 977 (1983), the court ruled, in yet another uprecedented decision, that the public trust now applies to *non*-navigable waters.)

[8] As to other owners on the "4,000 miles" of shoreline the later decision in *Lyon v. Western Title Ins. Co.,* 178 Cal. App.3d 1191, 1199 (1986), points out: "Those 4,000 miles must reasonably concern thousands, perhaps hundreds of thousands, of now devalued land titles acquired in reliance upon the rule of Civil Code Section 830." See also dissent in *Lyon* at 238, App. D at A-71; 70 Cal.L.Rev. 1138, 1145.

[9] In 1983 the court again pointed to *Illinois Central* as the basis for imposing the "tidelands trust" on inland lakes in California:

"[T]he decision of the United States Supreme Court in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387, remains the primary authority even today, almost nine decades after it was decided." The court also confirmed its ruling that the public trust servitude confers on the state "a power which extends to the revocation of previously granted rights or the enforcement of the trust against lands long thought to be free of the trust." (*National Audubon Society v. Superior Court,* 33 Cal.3d 419, 440 (1983); cert. denied, 464 U.S. 977 (1983).)

the confirmation of the extent of these rights was the subject of legislative,[10] executive,[11] and judicial[12] recognition in California.

Following the California Supreme Court's 1981 decisions in *Fogerty I* and *Lyon*, petitioners sought, and were denied, review by this Court. Subsequent trial and appellate court proceedings have shown that this litigation was not then ripe for review. The state, in its 1981 Opposition to the Petitions for Certiorari expressed no doubt as to their prematurity: ". . . issues respecting the location of high and low water lines remain to be tried on remand to the state trial court." The state pointed out that any opinion by this Court in 1981 at that stage of the litigation would be merely "advisory". (See p. 4 of state's Brief in Opposition.)

A principal issue in the continued state court proceedings was whether the high and low water marks that the court said determined the location of the public trust servitude were those that existed at California's statehood or those resulting from the

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[10] See California Civil Code § 830, for example.

[11] The court acknowledged that state files "contain hundreds of letters stating or implying that the state's ownership extends waterward of the ordinary low water mark . . . (*Lyon* at 225; App. D at A-51.) None of these letters suggest any state or public interest in the land above the "ordinary low water mark."

Between 1916 and 1964 no less than 5 "official" attorney general opinions interpreting Cal. Civ. Code § 830, as limiting the state's interest to the low water mark, were issued. See 43 Ops. Cal. Atty. Gen. 291, 292, 295, 296 (1964); 30 Ops. Cal. Atty. Gen. 262, 269 (1957); 23 Ops. Cal. Atty. Gen. 306, 307, 309 (1954); 23 Ops. Cal. Atty. Gen. 97, 98 (1954); Ops. Cal. Atty. Gen. No. 3100 pp. 5-6 (1916). In the 1964 opinion, Justice Mosk, the author of the *Lyon* and *Fogerty I* decisions, as California Attorney General, advised: "[I]t is now settled law in California that private ownership extends to the low water mark of non-tidal navigable waters." 43 Ops. Cal. Atty. Gen. 291, 295 (1964).

[12] See, for example, *Foss v. Johnstone*, 158 Cal. 119, 127 (1910); *Anderson v. Trotter*, 213 Cal. 414, 420 (1931); *City of Los Angeles v. Aitken*, 10 Cal.App.2d 460 (1935); *Crews v. Johnson*, 202 Cal.App.2d 256 (1962).

much later artificial impoundment of water at Lake Tahoe by the U.S. Bureau of Reclamation dam.

The trial court granted the state's motion for summary judgment, ruling the public trust servitude extended up the shoreline to the highest level the water could legally be raised by the federal dam.

Petitioner appealed, alleging, among other arguments, that Fifth and Fourteenth Amendment rights had been violated by the uncompensated taking of vested property interests resulting from the court's decision.

The court of appeal had to create a novel, unpredictable and unprecedented theory to uphold the trial court.[13] It designated its new legal theory "prescription." The decision in *Fogerty I* was pointed to as being responsible for this perverse and startling result:

> "The extent of the public trust must be established in accordance with the theory of prescriptive rights . . . [W]e read *Fogerty* as establishing that the People have acquired their public trust rights in the shorezone by prescription." *Id.* at 237, App. A at A-12.

The court of appeal discussed the well-established California doctrine of prescription (see, e.g., *Fogerty II,* at 238; App. A at A-13.), but since all of the essential elements of that doctrine were missing under the facts at Lake Tahoe, the court was unable to cite any California precedent to support its strange and unusual ruling except for the brief reference to *Fogerty I* quoted above.

The court's novel "prescriptive" theory did not fit within any existing California law for several reasons. Not only had there been no notice of any adverse claim by the state to the rights the court was transferring to the state, but conversely, the state, at all times prior to the filing of this action by petitioners in 1977, as discussed above, actually disclaimed any interest in the shoreline

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[13] The court of appeal rejected another novel state theory that the "agreed boundary" doctrine somehow gave the state title. (*Fogerty II, supra,* at 235-237; App. A at A-10-12.)

involved. Furthermore, the court of appeal, in *Fogerty II*, ignores the fact that the periodic raising and lowering of the water level of Lake Tahoe resulted from the federal dam owned and controlled by the Bureau of Reclamation and not the State of California. Consequently, the only adverse user, if in fact there was any, was the federal government, which by periodic flooding of the shoreline had acquired only a flowage easement. (See 30 Ops. Cal. Atty. Gen. at 268.) (Also somewhat perplexing is the court's choice of 1966 to 1971 as the prescriptive period for fixing the location of the public trust servitude.)[14]

Petitioner TSR filed a petition for review with the supreme court on January 5, 1987, which was denied on March 4, 1987. During this time, because California voters had earlier failed to confirm three of the sitting justices, the court was comprised of only four of the full complement of seven justices, one of whom had written the *Fogerty I, Lyon, City of Berkeley*[15] and *Venice Properties*[16] decisions and another had authored *National Audubon.*[17] (Four votes are required for hearing.)

The impact of this last court of appeal decision in *Fogerty II* on the interests of shoreline owners is well defined and drastic. With this final state court decision in this litigation, no longer is there any question as to the location and extent of the interests in the property transferred from the owners of the private shoreline frontage of Lake Tahoe to the state by the combined efforts of California's executive and judicial branches. The "taking" is now

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[14] Perhaps it was no coincidence that the five-year period chosen was immediately prior to the enactment of Code Civ. Proc. § 1007. (See *Fogerty II*, f.n. 10 at 240, App. A at A-15.)

[15] *City of Berkeley v. Superior Court,* 26 Cal.3d 515 (1980), cert. denied, 449 U.S. 840 (1980).

[16] *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal.3d 288 (1982), cert. granted, *sub nom. Summa Corp. v. Calif. ex rel. Lands Comm'n.,* 466 U.S. 198 (1984).

[17] *National Audubon Society v. Superior Court,* 33 Cal.3d 419 (1983), cert. denied, 464 U.S. 977 (1983).

complete. There are no further state remedies available to the shoreline owners.

REASONS FOR GRANTING THE WRIT

A. Preliminary Statement

A Writ of Certiorari should be issued to secure uniformity of conflicting decisions on federal constitutional law; to settle important questions of federal constitutional law on the power of state courts to suddenly, unpredictably and without precedent change state property law so as to divest owners of valuable property rights within their reasonable investment expectations; to settle the question of whether *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892) ("*Illinois Central*"), is a rule of federal common law limiting state power to convey sovereign lands underlying inland navigable waters and authorizing a state to impose the public trust at any time, and in any expanded form, regardless of existing, long-settled state law; and to settle whether state courts are free of the restraints of the Fourteenth and Fifth Amendment prohibitions against uncompensated takings and violations of due process. More specifically:

1. Earlier in this litigation the California Supreme Court (*Fogerty I*) held the public trust applied to the bed of Lake Tahoe (and all other "navigable" lakes and rivers in California) up to an undefined portion of the privately-owned shoreline. Previously, these private shoreline property interests had always been considered to consist of an unencumbered fee down to the ordinary low water mark. The decision in *Fogerty I* was a startling, sudden, retroactive and unpredictable reversal in California property law in terms of relevant precedents and, therefore, when finalized, would be a taking of private property, without payment, in violation of the Fourteenth and Fifth Amendments, and in conflict with the views in the concurring opinion in *Hughes v. State of Washington*, 389 U.S. 290 (1967), which were approved in *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (overruled on other grounds).

2. Later in this same proceeding (*Fogerty II*), the court of appeal announced a radical, unpredictable and unprecedented extension of the doctrine of prescription which retroactively, and without any previous notice to owners of any adverse claim, *finalized* the destruction of vested property rights of Lake Tahoe shoreline owners. Both *Fogerty I* and *Fogerty II* violate Fourteenth Amendment due process rights of private property owners and are in conflict with *Demorest v. City Bank Farmers Trust Co.*, 321 U.S. 36, 43 (1944), in that they do not rest upon a "fair or substantial basis"; are in conflict with *Broad River Power Co. v. South Carolina*, 281 U.S. 537 (1930), in that they so far depart from established principles as to be without substantial basis; are in conflict with *Fox River Paper Co. v. Railroad Comm. of Wisc.*, 274 U.S. 651, 656 (1927), in that they represent a "novel view," inconsistent with earlier state court decisions; and are in conflict with *Enterprise Irr. Dist. v. Farmers Mutual Canal Co.*, 243 U.S. 157, 164 (1917), in that they are "so clearly unfounded that it may properly be regarded as essentially arbitrary" and totally inconsistent with due process notice requirements as described in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982), Brennan, J., dissenting.

3. The California Supreme Court in *Fogerty I*, and the California Court of Appeal in *Fogerty II* in applying *Fogerty I*, have erroneously interpreted *Illinois Central* as supporting a retroactive change in well established state law which allows state court transfer of private property into public ownership without payment of just compensation. *Illinois Central* is also relied on as allowing state courts to expand and/or change the origin, scope and location of the public trust on the shorelines of California inland waterways without regard to either existing state law or federal Constitutional protections. *Illinois Central* is also relied on by the court as having "establish[ed] the principle" that a state "does not have the power" to convey shorelands free of the public trust. (*City of Berkeley v. Superior Court*, 26 Cal.3d 515, 521, cert. denied, 449 U.S. 840 (1980).) (Also see *Lyon, supra* at 227; App. D at A-55.)

4. If allowed to stand, *Fogerty I* and *Fogerty II* will support the proposition that a state court, unlike its executive and legislative branches, may not be guilty of a "take" in a constitutionally prohibited sense but rather simply "declares" the law even if the effect is a retroactive taking of vested property rights, especially if the state court concludes that "public interest" requires it to implement its concept of public policy to protect lands bordering on waterways in the "public interest" and from what it perceives to be environmental harm.

5. The decisions in *Fogerty I* and *Fogerty II* are contrary to the decision in *Summa Corp. v. Calif. ex rel. Lands Comm'n.*, 466 U.S. 198 (1984) (*"Summa"*), in that the state courts held the public trust in the shorelands involved at Lake Tahoe was created by prescription *after* statehood and thus would apply to lands that were not part of the bed of Lake Tahoe at the time of statehood. Therefore, the decisions could be argued to apply to the artificially created tidelands in the *Summa* matter and therefore conflict with *Summa*. The state decisions here are also contrary to *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (*"Kaiser Aetna"*), in denying to owners their reasonable expectations by imposing the public trust, without payment, to lands which had been previously represented to shoreline owners by all branches of state government to be unencumbered.

B. *Illinois Central Railroad Co. v. Illinois* Needs To Be Put in Its Proper Place in Public Trust Law

The state cannot reasonably argue that the decisions here, *Fogerty I* and *Fogerty II*, do not represent sudden, unpredictable and unprecedented changes in California property law. Neither can it be reasonably argued that the property rights lost by shoreline owners, are not valuable and essential parts of the bundle of rights of a variety protected by the Fourteenth and Fifth Amendments. A ruling by this Court is urgently needed before further damage is done to the rights of property owners on lakes and rivers not only in California but throughout the nation under the guise of enforcing a federal common law rule said to derive from the decision in *Illinois Central* which has the effect of

making state courts immune from the Fourteenth and Fifth Amendments, and which allows the transfer of private property to public ownership in the name of *Illinois Central*. *Illinois Central* needs the careful, correct and authoritative analysis that only this Court can give in order that state courts may not use that decision in the future when seeking justification for transferring private property to public ownership without payment.

California shoreline owners at Lake Tahoe and the owners of shoreline on what the California Supreme Court described as the other "navigable"[18] lakes and rivers in California, have been victimized by a series of judicial decisions and are desperately in need of help from this Court.[19] That help can be the affirmation of the constitutional limitations on state courts and, perhaps more importantly, by setting forth the reasonable and correct relationship of the *Illinois Central* decision to state court rulings on the public trust in the interest of restoring fairness and justice to this branch of law.[20]

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[18] See *Fogerty I*, at 245, App. C at A-24.

[19] Indeed, it appears there are more California court changes in the public trust law to come. Following the decision in *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983); cert. denied, 464 U.S. 977 (1983), owners of shoreline properties on *non*-navigable streams and lakes maywell also be subject to the confiscation of their rights by California courts under the theory that the "public trust" follows the waters into the non-navigable tributaries of the navigable lakes and rivers. As shown in f.n. 19 at 437, the California court suggested as much: "In view of the conclusion stated in the text, we need not consider the question whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreation interests—to *non*navigable streams." (Emphasis ours.)

[20] Nevada shoreline owners on Lake Tahoe may soon need the same help unless these California decisions are reversed now since the Nevada Attorney General in Opinion No. 204, issued April 20, 1976, ruled:

> "The State of Nevada owns the bed and shores of Lake Tahoe and other navigable waters within Nevada to the present ordinary and permanent high-water mark [according to *Fogerty II*—elevation 6228.75 feet]. The State of Nevada has not divested itself of any interest in the subject lands by state law or usage. Rather, it

The distortion and misuse of the *Illinois Central* decision in California began in 1971 with a California Supreme Court decision involving coastal tidelands. The decision in *Marks v. Whitney,* as discussed at 3, *supra,* greatly expanded the scope of the tidelands trust from the traditional navigation, commerce and fisheries to include "general recreational purposes" and other uses including "the preservation of those lands in their natural state."

Thereafter, in 1980, in *City of Berkeley,* as discussed at 4-5, *supra,* the supreme court held that tidelands were subject to the tidelands trust even where grants by the state to private parties were unrestricted. The court went so far as to hold it was virtually powerless in dealing with these lands, stating that: "The decision [*Illinois Central*] established the principle that a state . . . does not have the *power* to abdicate its role as trustee in favor of private parties." (Emphasis ours.) The court referred to *Illinois Central,* as the "seminal case on the scope of the public trust." (*Id.* at 521.)

In *Fogerty I* (and *Lyon*), as discussed earlier, in placing the public trust servitude on shoreline property at Lake Tahoe for the first time in California history, the court again relied upon *Illinois Central* as supporting this drastic change in California's property law.

In *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal.3d 288 (1982), ("*Venice Properties*"), (cert. granted *sub nom., Summa Corp. v. California ex rel. Lands Comm'n,* 466

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holds them in trust for full public enjoyment of navigation, fishery and related purposes."

Later, in response to this ruling and to such a claim by the State of Nevada in litigation, *Incline Village Gen. Improvement Dist. v. State of Nev.,* Case No. 78-3191, 2d Judicial Dist., County of Washoe, the Nevada Legislature passed and the Governor signed into law a bill stating that Nevada owned the bed of Lake Tahoe only up to the low water mark of elevation 6223 feet. If *Fogerty I* and *Fogerty II* are allowed to stand that same rationale would appear applicable to Nevada shoreline owners, i.e., that the Nevada Legislature's attempt to cure the Nevada Attorney General-created problem of ownership above the low water mark did not eliminate the public trust claim to the same shoreline property in Nevada, either. (Nev. Rev. Stat. § 321.595)

U.S. 198 (1984), the California court again used *Illinois Central* to support its conclusion that land grants by the Mexican government prior to California statehood and confirmed by the treaty of Guadalupe Hidalgo were nonetheless subject to the "public trust" even though the first time the claim was made was shortly prior to that recent litigation. Although this Court overruled the California Supreme Court and protected the private titles against the public trust claim, it does not appear that *Summa* settled the question of whether the state must have owned the property for the state to burden it with the public trust. The California court overruled earlier contrary precedent in its decision.[21] This state of affairs leaves what had previously been thought to be the public trust origin, i.e., the Equal Footing doctrine, somewhat confused in California, especially when compared to the recent ruling of this Court in *Summa*.

In *National Audubon Society v. Superior Court*, 33 Cal.3d 419, 438 (1983) ("*National Audubon*") cert. denied, 464 U.S. 977 (1983), the California court again used *Illinois Central* to support a decision which seems to be leading to another state taking of long-vested water rights from the City of Los Angeles without payment, in the name of *Illinois Central*.

Petitioner submits that *Illinois Central*, while it does describe the public trust which arises out of statehood, under the Equal Footing doctrine, does not justify expanding the traditional concepts of "navigation, commerce and fisheries"; does not apply above the point of practical navigability of a navigable lake; does not apply to land that was not acquired by the state at statehood under the Equal Footing doctrine; and that it is not a federal common law rule binding on the states.

Seemingly, this Court long ago recognized that *Illinois Central* was an interpretation of state, not federal, law. See *Appleby v. City of New York*, 271 U.S. 364 (1926) and *Illinois Central*

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[21] The Supreme Court's reference to its earlier decision on the point as "dictum" would not seem to detract from the point that it was again proclaiming a drastic change in California law. (See *infra* at 28.)

Railroad Co. v. Chicago, 176 U.S. 646 (1900).[22] As indicated in App. H at A-96, Illinois is a low water state, i.e., the upland owner owns the land down to the ordinary low water mark. California is also a low water mark state historically as was recognized by the California Supreme Court in *Lyon.* Consequently, there appears to be no rational basis for construing *Illinois Central* as justifying imposing the public trust above the low water. As Justice Clark observed in dissent in *Lyon*:

> "In concluding that the trust doctrine must extend to the shorezone the majority rely mainly upon *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110] where the Supreme Court held that a grant of *submerged* lands in Lake Michigan was subject to the trust. (*Id.* at p. 452, et seq. [36 L.Ed. at p. 1041, et seq.].) The court expressly recognized that it did not impose a trust on the shorezone. It stated: 'If it be ascertained . . . and determined that such piers and docks do not extend beyond the point of practical navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown . . . " (*Id.* at p. 450 [36 L.Ed. at p. 1041].) The court's order was to the same effect. (*Id.* at p. 464 [36 L.Ed. at pp. 1046-1047].)" *Lyon*, at 238, App. D at A-72. (Emphasis in original.)

Petitioner submits that Justice Clark correctly limited *Illinois Central* in this statement: "Far from serving as authority to extend the trust to freshwater shorezones, *Illinois Central Railway* reflects it is *only* navigable submerged lands that are subject to the trust." *Id.*, at 239, App. D at A-73. (Emphasis in original.)

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[22] As pointed out in *Lyon v. Western Title Ins. Co., supra* at 1201, the state courts of Illinois "clung to the rule that: 'The riparian owner [has] the right to the *exclusive use* [our italics] of the banks [of an inland waterway] to the low water mark.' (*Ensminger v. The People ex rel. Trover* (1868), 47 Ill. 384, 391; *City of Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296, 297].)"

Unquestionably, the application of *Illinois Central* by the California courts is being watched nationwide. Before further damage is done to the rights of shoreline owners directly affected, and to those yet unaware of these unfounded and unprecedented decisions, this Court should clearly state what *Illinois Central* stands for and thus reinstate the protection of the Fourteenth and Fifth Amendments to shoreline owners on all lakes and rivers.

C. State Courts Are Prohibited, Just as State Legislatures, from Transferring Private Property to Public Ownership Without Payment Even Though a Court May Conclude That Its Decision Is in the "Public Interest" and Promotes "Public Policy"

In California the public trust and the Fourteenth Amendment have collided. Notwithstanding the state courts' attempts to justify the resulting takings as necessary to preserve and protect areas bordering on waterways in California the impact on the shoreline owners is confiscation of their property without just compensation.

Seemingly, a nation-wide frustration among certain groups, not content with the government's power of eminent domain, nor with extensive land use regulations, has resulted in the promotion and encouragement of the use of the *Illinois Central* decision in a distorted and perverse fashion which, in California, at least, has placed property rights held to be subject to the public trust doctrine beyond the protection of the Constitution.

Some writers (state attorneys and judges, as well) have apparently concluded that the *Illinois Central* public trust doctrine, and any refinements, additions or novel applications a state court wishes to make of it, is available to overturn long-settled state law and to take property rights for public use contrary to all reasonable expectations of the owners and without regard to the emotional or financial impact on shoreline owners.

They argue that whatever interpretation or expansion of the *Illinois Central* decision a state court wishes to make has always been the law, lurking in obscure judicial shadows, waiting to be

dusted off and used to transfer property from its rightful owner to the state free of charge.[23]

In perhaps the bluntest statement as to the value to public agencies in using the courts and *Illinois Central* to transfer private property to public ownership without payment is found in a study[24] commissioned by the President's Council on Environmental Quality in the chapter, "Sidestepping the Taking Issue", where the authors suggest:

> "Professor Joseph Sax has discussed at length this concept of property 'as an interdependent network of competing uses' in articulating an expanded theory of the public trust inherent in property. [Sax, 'Takings, Private Property and Public Rights,' 81 Yale L.J. 149, 140 [sic] (1971).] Obviously, the possibility of claiming such paramount title interest is useful only in regard to particular types of property [obviously shoreline property], *but where available may be the easiest method of avoiding the taking issue*".[25] (Emphasis ours.)

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[23] Apparently there is also a widely-held view that courts do not "take" in a constitutional sense but rather simply "declare" the law. See, for example, Chang, "Unraveling *Robinson v. Ariyoshi: Can Courts 'Take' Property?*", 2 Hawaii L.Rev. 57, 68 (1979). A hint of this view is found in the recent case of *Corp. of the Presiding Bishop v. Hodel*, 637 F.Supp. 1398 (D.D.C. 1986), where that court seemingly expresses doubt as to whether this Court has ruled that a court "takes" in the constitutional sense by drastically changing existing property law:

> "Thus, the Supreme Court *has intimated*, without ever squarely holding, that a court may effect an unconstitutional taking by force of judgment when it arbitrarily reverses precedent and awards property to the state." (*Corp. of the Presiding Bishop*, at 1406.) (Emphasis ours.)

[24] Executive Office of the President's Council on Environmental Quality, "The Taking Issue." Washington, D.C., July 9, 1973, Chapter 16 at 313.

[25] In *Sax, The Public Trust Doctrine In Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L.Rev. 471, 474 (1970), Professor Sax suggested the way to evade payment for the takings of shoreline properties in the following language: "Of all the concepts known to American law, only the public trust doctrine seems to have the

The California Attorney General, the California State Lands Commission and the California courts answered the challenge and by their concerted efforts imposed the public trust on California land previously privately and exclusively owned. What was the "policy" justification for this taking? The California Supreme Court proclaimed:

> "The exercise of the police power has proved insufficent to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands."[26]

That the California Supreme Court is imposing its perception of what is best for the public interest, without regard to existing law, and is accomplishing that goal by a perverse application of its erroneous concept of the *Illinois Central* public trust doctrine, is also illustrated by the recent decision of the court in *National Audubon, supra* at 16. As the court put it, as its apparent justification for its judicial "intervention":

> "[T]he [Mono] lake's recession obviously diminishes its value as an economic, recreational, and scenic resource. Of course, there will be less lake to use and enjoy. The declining shrimp hatch depresses a local shrimping industry. The rings

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breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems." Sax describes *Illinois Central* as "the lodestar of American public trust law." (*Id.* at 489.)

[26] In *Fogerty I* the court extended its "policy" decision to lands of other owners, outside of Lake Tahoe, who were not even parties to this litigation:

"Whether or not the shorezone of Lake Tahoe would be better preserved if privately owned than if the public has an interest therein is not determinative, since we are not concerned here with recreation only, nor with Lake Tahoe alone, but with a principle which will apply to 4,000 linear miles along all the navigable lakes and rivers in California, in many of which the conditions may well differ in some respect from those at lake Tahoe." (*Fogerty I, supra,* at 247; App. C at A-28.)

> of dry lake bed are difficult to traverse on foot, and thus impair human access to the lake, and reduce the lake's substantial scenic value. Mono Lake has long been treasured as a unique scenic, recreational and scientific resource, [citations omitted] but continued diversions threaten to turn it into a desert wasteland like the dry bed of Owens Lake." (*Id. at 431.*)

The court, thereafter, had no difficulty in converting what it considered to be an appropriate public policy at Mono Lake into new state law and, after discussing *Illinois Central*, set forth its thoughts both on its power and the absence, under its theory, of any Constitutional protection to property owners where the public trust is involved:

> "[W]e rejected the claim that establishment of the public trust constituted a taking of property for which compensation was required . . . In summary, the foregoing cases [including *Illinois Central*] amply demonstrate the continuing power of the state as administrator of the public trust, a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust. (See *City of Berkeley v. Superior Court, supra,* 26 Cal.3d 515.)" (*National Audubon, supra,* at 440.)[27]"

The court again ties its ruling to the *Illinois Central* decision, stating that it "remains the primary authority even today, almost nine decades after it was decided." (*National Audubon, supra* at 437.)

The reasoning of the California courts that the *Illinois Central* public trust doctrine overrides the Constitution and that it may be used to promote public policy goals originating with the court is contrary to the decisions of this Court. In a case remarkably similar to ours, this Court's constitutional limits on a state taking property in the name of public policy are reviewed. In *Sotomura*

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[27] A "power" that apparently runs only one way—the imposition of further and expanded burdens on more and more private shoreline, since the same court asserted in *City of Berkeley* that it "did not have the power" to relieve a private owner of the burden. (See *supra* at 15.)

v. County of Hawaii, 460 F.Supp. 473 (1978), the Hawaii Supreme Court's decision transferring private ownership of coastal beaches to the state without payment was under attack in the federal court. That court correctly stated:

> "The decision in *Sotomura* was contrary to established practice, history and precedent and, apparently, was intended to implement the court's conclusion that public policy favors extension of public use and ownership of the shoreline. *A desire to promote public policy, however, does not constitute the justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it. Chicago, Burlington and Quincy Railroad v. Chicago,* 166 U.S. 226 (1897)." (*Id.* at 481.) (Emphasis ours.)

Justice Brennan reaffirmed this aspect of constitutional law in a recent regulatory taking case:

> "But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense of doing so." (*San Diego Gas & Elec. Co. v. San Diego* (Brennan, J., dissenting), 450 U.S. 621, 661 (1981).[28]

The views and decisions of the California courts on the impact of the public trust on constitutional guarantees and on its extent and application are totally repugnant to the admonitions and decisions of this Court. Constitutional protections are being ignored while the state, through its courts, transfers basic rights

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[28] In *Leo Sheep Co. v. United States,* 440 U.S. 668 (1979), in rejecting the Government's contention of an implied easement of necessity to federal land over private land granted to the railroads in connection with the transcontinental railroad construction, the majority observed that the "easement is not actually a matter of necessity in this case because the Government has the power of eminent domain." (*Id.* 679-680.) In other words, as applied to the California situation, if public policy requires state ownership of all the interests (except the "naked fee") in the shoreline of all California lakes and rivers let the state pay as required by constitutional law!

from shoreline owners to itself without payment. This shameful misuse of the power of courts must be stopped and the unconstitutional actions reversed. It is not too late to bring back the Fourteenth and Fifth Amendment protection to California shoreline property owners. However, without this Court's help the cause may be irretrievably lost in California, and thus provide even greater impetus nationwide for this grossly unjust method of transferring valuable, vested and essential property interests from private owners to the public without payment.

D. The State Court Decisions in This Proceeding Have Suddenly and Unpredictably Changed California Property Law and Therefore Constitutionally Prohibited Takings and Due Process Violations Have Occurred

The earlier California Supreme Court decision leading up to the final judgment in this proceeding, *Fogerty I,* radically changed California law by imposing the public trust in an undefined location on the private shoreline property at Lake Tahoe. The more recent California court decision in this proceeding, *Fogerty II,* radically, unpredictably and without state law precedent changed the California law of prescription resulting in the taking of valuable vested property interests in specific and well defined shoreline land. *Fogerty II* completed the taking of private property commenced in *Fogerty I.* Furthermore, the extinguishment of private property rights which resulted from awarding the property to the state based upon the limited adverse use by the *federal* government did not give the constitutionally required notice to the owner of the belated *state* claim and is therefore a violation of due process. (See, e.g., *Texaco, Inc. v. Short,* 454 U.S. 516 (1982), *Hodel v. Irving,* No. 85-631 (May 18, 1987).

Until the decision in *Fogerty I* there was not even a hint in California custom, practice, history, statutes or judicial precedent that the property of shoreline owners on Lake Tahoe, or any other navigable lakes and rivers in California, would be held to be subject to a public trust servitude, let alone property above the *low* water mark as it existed on Lake Tahoe at California's admission to the Union—not to mention the novel and remarkable court-created theory that places it even above the high water mark!

Further proof that *Fogerty I* is a radical change in California law is found in the dissent of Justice Clark where he refers to the previous law: "[T]he public trust declared today by the majority applies only to tide and submerged lands and does not apply to the shorezone." 29 Cal.3d at 249. He points out the ruling that estoppel did not apply to the Lake Tahoe shorezone was also contrary to the court's earlier decision in a similar case which involved the tidelands at a time when *only* the tidelands were subject to the public trust. Justice Clark protests: "I must also dissent from the majority's conclusion that the People may not be estopped from asserting the trust. The holding of the sole authority relied on by the majority, *City of Long Beach v. Mansell,* 3 Cal. 3d 462 [91 Cal.Rptr. 23, 476 P.2d 423] (1970), is *directly* contrary to *today's decision.*" (*Fogerty I,* at 250; App. C at A-32.) (Emphasis ours.)

More evidence that *Fogerty I* is a drastic, radical and retroactive change in California law is the decision of another California court of appeal occurring well after *Fogerty I* and *Lyon.* Mr. Lyon, the original victim of the state at Clear Lake, filed suit against his title company in an attempt to recover for the loss suffered when the California Supreme Court transferred his private property into public ownership. The California Court of Appeal, First Appellate District, in *Lyon v. Western Title Ins. Co.,* 178 Cal.App.3d 1191 (1986), reluctantly ruled that his title policy excluded the coverage sought.[29] However, the court was not content to let the matter rest there and severely criticized the *Fogerty I* and *Lyon* decisions as drastic, retroactive confiscation of vested property rights. (Reprinted in full in App. I at A-100.)

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[29] The court, in *Lyon v. Western Title Ins. Co.,* expresses its frustration at being required to be a party to the result forced upon it by the California Supreme Court decisions in *Lyon* and *Fogerty I:*

> "Nevertheless, we are told by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937], that 'all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction.' Obedient to that rule, and regardless of the views we have expressed, we must, and do, declare the holding of *Lyon* to be the law of the state." (*Id.* at 1203.)

An illustration of this California court's strong views on the unjudicious nature of the California Supreme Court's decision on the public trust:

> "On the instant appeal Lyon insistently contends that *Lyon's* innovative public trust doctrine which did not exist when he acquired Anderson Marsh, is bad law, unsupported by authority, violative of the separation of powers doctrine explicated by the state and federal Constitutions, and has taken his property for public use contrary to the state's Constitution, article I, section 19 [just compensation for taking].
>
> "Respectfully, we find ourselves in agreement." (*Lyon v. Western Title, supra,* at 1200, App. I at A-109.)[30]

California Supreme Court Justice Richardson, who dissented in *Lyon, Fogerty I* and in *City of Berkeley,* also indicated his displeasure with the court's treatment of property owners under the public trust doctrine in his dissent in *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal.3d 288 (1982), cert. granted *sub nom., Summa Corp. v. Calif. ex rel. Lands Comm'n.,* 466 U.S. 198 (1984). Justice Richardson wrote about this unprecedented change in law and the drastic inroads into the rights of California shoreline owners as follows:

> "There is no precedent for such an extension of public ownership. The Legislature has never reached so far, nor have we. In *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], a bare majority of this court first expounded the notion that *tidelands in navigable waters which had been conveyed by the state* to private parties nonetheless were encumbered by a reserved public trust for commerce, navigation, fishing and

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[30] The court added: "We are not alone in our criticism of *Lyon:* see Note, Lyon and Fogerty, Unprecedented Extensions of the Public Trust (1982), 70 Cal. L.Rev. 1138; The Public Trust After Lyon and Fogerty, Private Interests and Public Expectations—A New Balance (1983), 16 U.C. Davis L.Rev. 631; Note, Property Boundaries—Civil Code § 830 Grants Nontidal Shorezone to Private Landowners, Subject to Tidelands Trust (1982), 22 Santa Clara L.Rev. 559." (*Id.* at p. 1203.)

other uses. (*Id.* at pp. 523, 528.) In the following year in *State of California v. Superior Court* (*Lyon*) (1981) 29 Cal.3d 210 [172 Cal.Rptr. 696, 625 P.2d 239], the same majority extended this new doctrine to lands between high and low water in *nontidal navigable lakes which had been granted by the state* into private ownership." (*Id.* at 307.)

That a state court cannot transfer private property into public ownership without payment is made clear by Justice Stewart's concurrence in *Hughes v. Washington, supra,* under circumstances parallel to the instant matter:

"[T]o the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent it constitutes a sudden change in state law, unpredictable in terms of relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this court." (*Id.* at 296-297.)

And in language which also accurately describes the Lake Tahoe shoreline owners' similar situation:

"There can be little doubt about the impact of that change [the declaration that accretions belong to the state] upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain . . . Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." (*Id.* at 297-298.)

(See also *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 680 (1930).)

In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), Justice Rehnquist agreed that the "reasonable expectations" referred to by Justice Stewart in *Hughes* were a critical element in determining the extent of previously vested rights of the owner. Especially was this so when the right to be taken by the government was the "right to exclude" others. While stating that "individual officials representing the United States cannot 'estop' the United States," it was observed that such an historical background of government consent "can lead to the fruition of a number of expectancies embodied in the concept of 'property,'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the managment of the landowner's property. In this case, we hold that the 'right to exclude', so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." (*Id.* at 179-180.)[31]

Moreover, to some degree in *Fogerty I* and unquestionably in *Fogerty II* the property held to be subject to the public trust was property that had never been in state ownership before the court decisions. Since the genesis of the public trust is the Equal Footing doctrine, property never before owned by the state simply could not become subject to the servitude. However, contrary to this principle, in *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal.3d 288 (1982), the California court ruled that lands in southern California, acquired by Mexican grants, which were never state owned, were nevertheless subject to the public trust. Justice Richardson, in dissent, pointed out at p. 307:

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[31] Compare the fundamental conflict between this Court's "reasonable expectations" approach in *Kaiser Aetna* to the California Supreme Court's rejection of petitioner's estoppel argument in *Fogerty I* which, too, was based on "an historical background of government consent." (*Fogerty I, supra* at 244-247, App. C at A-23-28.) Additionally, as Justice Clark pointed out, the California Supreme Court's earlier ruling on estoppel in *City of Long Beach v. Mansell*, 3 Cal.3d 462 (1970) was "directly contrary to today's [*Fogerty I*] decision." (See *Fogerty I, supra* at 250, App. C at A-32.)

> "By imposing a public trust easement upon properties which are neither tidal, navigable, nor formerly under public dominion, the majority has removed all heretofore recognized reasonable limitations on the scope of the public trust doctrine."

The majority in *Venice Properties* had overruled what it called "dictum" in *San Diego County Archaeological Society, Inc. v. Compadres*, 81 Cal.App.3d 923, 927 (1978) to the effect that "the public trust doctrine applies only to property to which the state has at one time held title."

Justice Richardson goes on to explain how the court has distorted the previous law in regard to its conclusion that the state need not have owned the property in order for the public trust to burden the land:

> "It should be carefully noted that the rationale of the public trust doctrine is that the *public* lands conveyed into private ownership remain subject to public use for certain limited purposes unless the intention to extinguish that public right is clearly expressed in the grant. The doctrine operates when the ownership of land and waters vested in California upon its admission to the Union (*Borax, Ltd. v. Los Angeles* (1935) 296 U.S. 10, 15 [80 L.Ed. 9, 14, 56 S.Ct. 23]) is thereafter conveyed into private hands, the doctrine reserving in the public grantor a public trust. In short, the principle limits *subsequently created* private property rights. (*People v. California Fish Co.* (1913) 166 Cal. 576, 583-585 [138 P. 79].)
>
> "It seems to be obvious that this reasoning has no application to lands like those before us which *never* were owned publicly. Indeed, the majority freely acknowledges that we have never before applied the public trust doctrine to such property. (*Ante* p. 298.) Nonetheless, my colleagues assert, without analysis, that prior government ownership is not essential to the application of that doctrine, but that unadorned, unsupported, bare conclusory assertion is not persuasive. In my view the majority thus errs in applying the public trust doctrine to the property before us, title to which

has been exclusively in private ownership since 1839."[32] (31 Cal.3d at 307-308.) (Emphasis in original.)

CONCLUSION

As was pointed out by the district judge in *Robinson v. Ariyoshi,* 441 F.Supp. 559 (1977):[33]

> "Underlying the right of the courts and legislature to make changes in the law, however, is the concomitant obligation of the State to compensate those whose property may have been taken over by the State by those changes. *Chicago, Burlington & c. R'D v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Even by legislative fiat, property cannot be expropriated and taken over by the State without compensating the private owner for his lost rights. No more can private property be so taken away by judicial decision and handed over, gratis, to the State. 'The touchstone of due process is the protection of the individual against arbitrary action of the government.' *Wolff v. McDonell,* 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935." (*Id.* at 584-585.)

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[32] Although the majority's reasoning on the lack of necessity of state ownership to support the application of the public trust seems to have been severely discredited in the subsequent overturning by this Court of *Venice Properties* in *Summa,* a narrow reading of that decision by the court below may leave that portion of the *Venice Properties* decision intact.

[33] Subsequently the Ninth Circuit upheld the District Court. See 753 F.2d 1468 (9th Cir. 1985), vacated and remanded, No. 85-406 (June 23, 1986). Based on the citation of *Williamson Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985), by this Court on remand apparently the petition for certiorari was deemed premature.

In this year of the celebration of the Constitution, and its Amendments, it seems especially appropriate to remind state courts that they, no less than the executive and legislative branches, are prohibited by the Fifth and Fourteenth Amendments from transferring private property to the state without payment and to reinforce the proposition that the Due Process and Taking Clauses are not just high-sounding phrases but are meaningful and enforceable constitutional rights designed to protect the individual from just such arbitrary actions by all branches of state government as have occurred here.

Respectfully submitted,

WILLIAM T. CHIDLAW
Attorney for Petitioner
Tahoe Shorezone
Representation

(Appendices follow)

Appendix A

In the Court of Appeal
of the State of California
in and for the Third Appellate District
(Placer)

3 Civil 25115
(Super.Ct.No. 48281)

Charles F. Fogerty,
Tahoe Shorezone, Representation, et al.,
Plaintiffs and Appellants,

vs.

State of California, et al.,
Defendants and Respondents.

[Filed Nov. 24, 1986]

APPEAL from a judgment of the Superior Court of Placer County, Keith Sparks and George Yonehiro, Judges. As modified, the judgment is affirmed.

William T. Chidlaw, Peter E. Racobs, Washburn & Kemp, and Edgar B. Washburn for Plaintiffs and Appellants.

John K. Van De Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General, Jan Stevens and David B. Judson, Deputy Attorneys General for Defendants and Respondents.

In State of California v. Superior Court (Lyon) (1981) 29 Cal.3d 210 (hereafter "*Lyon*") our Supreme Court held that the lands lying between the low and high watermarks of Clear Lake are owned by their littoral owners subject to a "trust" interest held by the State of California for the benefit of the public for purposes of commerce, navigation, fishing, recreation, and preservation of the land in its natural state. (*Id.*, at pp. 226-233.) In State of California v. Superior Court (Fogerty) (1981) 29 Cal.3d 240 (hereafter "*Fogerty*") our high court held, in this very case, that the public trust enunciated in *Lyon* was applicable to Lake Tahoe. (*Id.*, at pp. 243, 247.) In this appeal, we hold that, for purposes of

determining the boundaries of land along the shore of Lake Tahoe subject to the public trust, the low watermark of the lake is 6223 feet above sea level, Lake Tahoe datum, and the high watermark is 6228.75 feet above sea level, Lake Tahoe datum.

PROCEDURAL BACKGROUND

This litigation began in 1977 when the Attorney General informed the State Lands Commission that the state claimed fee ownership of the shorezone, the property lying between the low and high watermarks of navigable nontidal lakes and rivers. (*Fogerty*, supra, 29 Cal.3d at p. 243.) The Commission proposed to record claims to such lands in county recorders' offices throughout the state. (*Ibid.*) Thereupon, plaintiffs Charles and Stella Fogerty and other owners of property along the shores of Lake Tahoe, and Tahoe Shorezone Representation, a corporation which represents many shorezone owners, filed this litigation claiming they and not the state owned the lands between low and high waters. (*Ibid.*) In *Lyon* our Supreme Court resolved this question, concluding private citizens held fee title to the lands to the low watermark. (*Lyon*, supra, 29 Cal.3d at p. 226.) The court went on to hold, however, that the land between low and high water was subject to the public trust. (*Id.*, at pp. 226-233.)

The court first determined that California acquired sovereign fee ownership of the lands between low and high water in nontidal navigable lakes and rivers upon its admission to the Union. (*Lyon*, supra, at pp. 217-222.) The court next determined that, by the enactment of Civil Code section 830 in 1872, the Legislature granted fee title to the lands in question to the littoral property owners.[1] (*Id.*, at pp. 222-226.) Finally, the court considered whether the grant of fee title was free of the public trust described

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[1] Civil Code section 830 provides that "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

in City of Berkeley v. Superior Court (1980) 26 Cal.3d 515. The court concluded it was not, and that the trust still applied, relying on the settled proposition that lands held by the state in trust remain subject to the trust once conveyed to private parties unless the conveyance was made for trust purposes. (*Lyon,* supra, at pp. 226-232.)

In *Fogerty,* the People sought a writ of mandate from our Supreme Court after the trial court had entered partial summary judgment decreeing that no real property lying landward of the last *natural* low watermark of Lake Tahoe was subject to the public trust. (29 Cal.3d at p. 243.) The court addressed two questions not discussed in *Lyon.*

First, the court concluded the People may not be estopped from asserting their public trust interest in those lands lying between low and high watermarks: "The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands." (*Fogerty,* supra, 29 Cal.3d at p. 247.)

Second, the court concluded the boundary between public and private ownership was to be measured by using the "current" level of the lake. (*Id.,* at pp. 248-249.) Although Lake Tahoe had existed before statehood, its elevation was raised significantly by the construction of a dam across its natural outlet into the Truckee River in 1870. (*Fogerty,* supra, 29 Cal.3d at p. 247.) Lands were inundated which, before statehood, had belonged to the littoral owners free of the public trust. The court therefore faced the question whether these newly-flooded lands remained free of the trust or had become subject to it. (*Ibid.*)

The court began by noting with approval the People's contention that it would be difficult if not impossible to reconstruct the natural water levels of a lake. (*Id.,* at p. 248.) The court reasoned that "The monumental evidentiary problem which would be created by measuring the boundary line between public and private ownership in accordance with the water level which existed prior to the construction of [the dam] provides a convinc-

ing justification for accepting *the current level of the lake* as the appropriate standard." (*Ibid.*, emphasis added.)

The court went on to note, "Moreover, the dam at Lake Tahoe has been in existence since 1870, long past the period required for the acquisition of prescriptive rights by the state of the lands in question. (Civ. Code, § 1007; Code Civ. Proc., § 325.) It has been held in other jurisdictions that a landowner loses ownership of property covered by water resulting from the construction of a dam if the condition has continued for the period required for the acquisition of prescriptive rights. (*State v. Parker* (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; *State v. Sorenson* (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) *Sorenson* stated that in these circumstances 'the artificial condition is . . . stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition.' " (*Fogerty*, supra, 29 Cal.3d at pp. 248-249.) Thus, the court held the trial court had erred in using the pre-dam level of the lake to set the low watermark. (*Id.*, at p. 249.)

The *Fogerty* court issued a writ of mandate directing the trial court (a) to vacate its order granting the landowners' motion for partial summary judgment and (b) to grant the People's motion for partial summary judgment and partial judgment on the pleadings "insofar as consistent with the views expressed above." (*Ibid.*)

In *Lyon*, the court added a footnote referring to *Fogerty* and directing "that the determination of the boundary between public and private ownership must be assessed in accordance with the shoreline of the lake as it exists presently." (*Lyon*, supra, 29 Cal.3d at p. 232, fn. 20.) The *Lyon* court issued a writ identical to that in *Fogerty*. (*Id.*, at p. 233.)

Following our Supreme Court's issuance of its writ to the trial court in this case, the state moved for summary judgment. The state submitted voluminous exhibits in support of its motion

which established, among other things, that several agencies of government including the U.S. Army Corps of Engineers, the California Tahoe Regional Planning Agency and the bistate Tahoe Regional Planning Agency have consistently used the figure of 6229.1 feet above sea level as the lake's high watermark. That figure had its genesis with the California-Nevada Interstate Compact Commission in 1934 and was premised on the volume of water needed by users along the Truckee River. It was incorporated in the Truckee River Agreement of 1935 which was negotiated by the United States and several major users of Truckee River water. (See generally 30 Ops.Cal.Atty.Gen. 262 (1957).) It was also incorporated in a consent decree which adjudicated the water rights of all users of Truckee River water. (U.S. v. Orr Water Ditch Co. (U.S. Dist. Ct., Nev. 1944) Equity No. A3.) However, the littoral property owners were never made parties to the negotiations or the litigation. (30 Ops.Cal.Atty.Gen., supra, at p. 268.)

Defendants' exhibit R showed the maximum and minimum lake elevations from 1900 to 1984. The exhibit revealed that since 1917 the lake had never reached its negotiated high watermark of 6229.1 feet.[2] The data summarized in the exhibit are undisputed by the parties.

The trial court entered summary judgment in favor of the state establishing among other things that: (1) the lake's *high* watermark, as well as its low watermark, is to be determined in accordance with the lake's current conditions; and (2) the high watermark of Lake Tahoe constituting the uppermost limit of the lake subject to the public trust is located at 6229.1 feet above sea level, Lake Tahoe datum.[3]

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[2] However, it had come close on several occasions. Since the entry of the consent decree in 1944 (which established the present mode of water level regulation) the lake exceeded elevation 6229 feet on a total of 81 days. During that time, however, it never rose the next one-tenth of a foot to the theoretical maximum of 6229.1 feet.

[3] The trial court's judgment established the following:

"1. Plaintiff landowners holding otherwise valid grants to the shores of Lake Tahoe hold to the low water mark thereof;

Plaintiffs' appeal challenges these two rulings. As we shall explain, we conclude many of plaintiffs' contentions are foreclosed by *Lyon* and *Fogerty*. However, plaintiffs also assert the trial court erroneously fixed the high watermark at a theoretical maximum elevation which the lake has not reached since 1917. This contention is meritorious; we shall modify the trial court's summary judgment to reflect the high watermark as disclosed by the record in accordance with the state's acquisition of its property interest by prescription.

Plaintiffs have acquiesced in the summary judgment's establishment of 6223 feet as the lake's low watermark and do not challenge that figure on appeal. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 479, p. 469.) Defendants have not cross-appealed (see op. cit. supra, at pp. 394-395) and may make no challenge of their own. Accordingly, the figure of 6223 feet as the low watermark is conclusively established. Consequently, as mod-

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"2. The title of littoral owners at Lake Tahoe is impressed with a public trust for commerce, navigation, fisheries and environmental preservation to the high water mark thereof;

"3. The state may not be estopped from asserting the rights of the public to the high water mark at Lake Tahoe;

"4. The high and low water marks at Lake Tahoe are to be determined in accordance with the current condition of that lake;

"5. The low water mark constituting the fee boundary between [the bed of Lake Tahoe in] state sovereign ownership and upland fee ownership is located at 6223 feet above sea level, Lake Tahoe datum;

"6. The high water mark of Lake Tahoe constituting the uppermost limit of that lake subject to the public trust is located at 6229.1 feet above sea level, Lake Tahoe datum;

"7. Any right of the plaintiffs herein to pier out to the line of navigation in Lake Tahoe is subject to the authority of the State of California and its designees to impose reasonable regulations;

"8. Plaintiffs holding property littoral to the bed of Lake Tahoe have not been deprived of the use or enjoyment thereof without compensation, contrary to the provisions of article 1, section 19 of the state Constitution and amendments V and XIV of the United States Constitution."

ified to reflect the correct high watermark, the judgment shall be affirmed.

DISCUSSION

I

Certain of Plaintiffs' Contentions Cannot be Reconciled with Lyon and Fogerty.

Read together, we think *Lyon* and *Fogerty* establish the following rules: (1) the littoral property owners own the shorezone[4] of Lake Tahoe in fee simple to the low watermark of the lake in its "current" condition; (2) the property owners' fee simple title in the shorezone is impressed with a public trust analagous to an easement, acquired by the State of California pursuant to the doctrine of prescription and held for the benefit of the public for purposes of commerce, navigation, fishing, recreation and preservation of the land in its natural state.

In their attack on the judgment, plaintiffs have fired a fusillade of contentions that essentially ask us to undo what *Lyon* and *Fogerty* have done.[5] Thus, for example, although plaintiffs concede in their brief that "*Lyon* held that the public trust easement extends to the ordinary high watermark, making it necessary to ascertain the location of that line," plaintiffs contend the high watermark must be set according to conditions prevailing in 1850, when California was admitted to the Union.

This argument cannot be reconciled with *Fogerty's* conclusion the state has acquired prescriptive rights by the incursion of higher water caused by construction of the dam. (29 Cal.3d at pp.

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[4] The lands between low and high water. (*Fogerty*, supra, 29 Cal.3d at p. 245.)

[5] These include the assertions: (1) that our Supreme Court's decisions in *Lyon* and *Fogerty* constitute a "sudden and unpredictable change in state law" and thereby violate their constitutional rights to due process of law; (2) that the state acquired no prescriptive rights in new shorezone created by construction of the dam; and (3) that any prescriptive rights acquired by the state permit fewer uses of land by the public than the uses allowed by the public trust doctrine.

248-249.) The argument also asks us to disregard *Fogerty's* instruction that the low watermark must be set according to the "current" level of the lake. (*Id.*, at p. 248.) Plainly if the shorezone must be established, and if the lower boundary of that zone must be set by using the "current" level of the lake after construction of a dam, then the upper boundary cannot be set using the pre-dam level. That formula would theoretically allow the upper boundary of the shorezone to be set at an elevation lower than the lower boundary, so the shorezone would always be under water.[6] That result would effectively remove all shore from the shorezone. Such a result cannot be reconciled with *Fogerty*'s extensive discussion of the shorezone as "*land* between high and low water" necessary for the survival of birds, plants, and vegetation and useful for picnicking, hunting and biking. (*Fogerty*, supra, 29 Cal.3d at p. 245, emphasis added.)

As an inferior court, we are duty bound to follow and apply the law as interpreted by our Supreme Court. (Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.) Plaintiffs suggest the Supreme Court's express instructions—to set the low watermark using post-dam conditions—are dicta and may be disregarded by this court. We cannot agree. Even when part of an opinion is not relevant to material facts, if it is responsive to an argument raised by counsel and intended for guidance of the court and attorneys upon a new hearing, it probably constitutes the basis of the decision and cannot be disregarded by a lower court as mere dictum. (United Steelworkers of America v. Board of Education (1984) 162 Cal.App.3d 823, 834-835; Paley v. Superior Court (1955) 137 Cal.App.2d 450, 460.) Here, in both *Lyon* and *Fogerty*, the Supreme Court issued writs directing lower courts to rule "consistent with the views expressed above." (*Lyon*, supra, at p. 233; *Fogerty* supra, at p. 249.) In these circumstances, *Fogerty*'s direction to use the "current" post-dam level of the lake

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[6] It is immaterial that the lower boundary now established—6223 feet—may or may not be lower than the high level of the lake in 1850. That figure had not been agreed upon and was not discussed by the court in *Fogerty*.

is not dictum.[7] (United Steelworkers of America v. Board of Education, supra, 162 Cal.App.3d at p. 835.) Indeed, the court's remarks on the question constitute the law of the case that we are obliged to follow. (People v. Shuey (1975) 13 Cal.3d 835, 841; compare Searle v. Allstate Life Ins. Co. (1985) 38 Cal.3d 425, 434.) We shall therefore use the "current" condition of the lake to set the high watermark.

II

The "Current" Level of Lake Tahoe is 6228.75 Feet Above Sea Level, Lake Tahoe Datum.

Plaintiffs contend the trial court erred in setting the high level of the lake it 6229.1 feet above seal level. For reasons that follow, we agree.

A. The 1944 consent decree adjudicating water rights of all users of Truckee River water does not establish the high watermark of Lake Tahoe for public trust purposes.

In a consent decree entered into in 1944, the level of Lake Tahoe was set at 6229.1 feet for purposes of adjudicating the water rights of all users of Truckee River water. (U.S. v. Orr Water Ditch Co. (U.S. Dist. Ct., Nev. 1944) Equity No. A3.) The Attorney General now argues the consent decree may be used to set the high level of the lake in this case. However, in 1957, the California Attorney General opined the consent decree could have no effect on the property rights of littoral property owners because they were not parties to the litigation. (30 Ops.Cal.Atty.Gen., supra, at p. 268.) We think the Attorney General had it right in 1957. The party against whom the plea of collateral estoppel or res judicata is asserted must have been a party or otherwise privy to the prior action. (F. W. Woolworth Co. v. Franchise Tax Bd. (1984) 160 Cal.App.3d 1154, 1160.)

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[7] Even assuming it is dictum we would be bound to follow it. (See County of Fresno v. Superior Court (1978) 82 Cal.App.3d 191, 194.)

Since such was not the case here, the consent decree has no effect on plaintiff's property rights.[8]

B. The state did not acquire any property rights by plaintiffs' "acquiescence" in public administrative agencies' use of 6229.1 feet above sea level as the high level of the lake.

As we have noted, the level of Lake Tahoe has never reached elevation 6229.1 feet since 1917. Nonetheless, the defendants note that correspondence and records maintained by the State Lands Commission reveal a widespread acceptance of 6229.1 feet as the lake's high watermark. Defendants also point to an affidavit by plaintiffs' counsel suggesting that the figure of 6229 feet is "generally accepted" as the high watermark. In addition, defendants note that the U.S. Army Corps of Engineers, the California Tahoe Regional Planning Agency and the bistate Tahoe Regional Planning Agency have consistently used that figure. Defendants conclude the widespread acceptance of the figure (6229.1 feet) compels the conclusion the figure has been established by "acquiescence" and is now binding on plaintiffs. We cannot agree.

We note, first of all, that in *Fogerty* our Supreme Court neither stated nor implied that it was of the view the littoral owners' land had been impressed with the public trust under a novel theory of "acquiescene." We do not read *Fogerty* as establishing some new theory by which the state acquires rights in private property. Indeed, what the court said in *Fogerty* was precisely the opposite—that the state's rights were obtained under the long-established doctrine of prescription. The state's proposed theory of "acquiescene" is therefore not "consistent with the views expressed" in *Fogerty*, as that case directs. (29 Cal.3d at p. 233.)

Moreover, if defendants' claim of "acquiescence" has any grounding in an established theory of property rights, it may be viewed as an assertion of an "agreed boundary." However, the assertion may not be maintained. The doctrine of agreed boundary is wholly insufficient to sustain the trial court's high watermark of 6229.1 feet.

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[8] We also note the consent decree litigated water rights, not property rights.

The elements required to establish an agreed boundary are well established. They are: (1) uncertainty as to the true boundary line; (2) an express or implied agreement between adjoining landowners to accept a line as the boundary; and (3) acceptance and acquiescence in the line for a period equal to the statute of limitations or until action is taken in reliance on the agreement which would result in substantial loss if the boundary were altered. (French v. Brinkman (1963) 60 Cal.2d 547, 551; Ernie v. Trinity Lutheran Church (1959) 51 Cal.2d 702, 707-709; see Humphrey v. Futter (1985) 169 Cal.App.3d 333, 338; Finley v. Yuba County Water Dist. (1979) 99 Cal.App.3d 691; 699; 3 Miller & Starr (rev. ed. 1977) § 21:27, pp. 552-559.)

The objects of the agreed boundary doctrine are to secure repose, to prevent strife and disputes concerning boundaries, and make titles permanent and stable. (Martin v. Lopes (1946) 28 Cal.2d 618, 623; 3 Miller & Starr, op. cit. supra, § 21:27, pp. 553-554.) The policy of the law is to give stability to agreements which the parties themselves undertake in good faith in an effort to settle an extant controversy. (Martin v. Lopes, supra, at p. 624.)

Where an extant controversy is absent the doctrine may not be applied. For example, the mere erection of a fence at a certain point does not establish a boundary if there is no dispute which the construction of the fence purports to resolve. (See Dooley's Hardware Mart v. Trigg (1969) 270 Cal.App.2d 337, 340.) Although the existence of a dispute may be inferred from long standing acceptance of a fence as a boundary (Ernie v. Trinity Lutheran Church, supra, 51 Cal.2d at p. 708), where there is direct evidence that no controversy existed the doctrine of agreed boundaries is inapposite. (Dooley's Hardware Mart v. Trigg, supra, 270 Cal.App.2d at pp. 340-341; 3 Miller & Starr, op. cit. supra, § 21:31, p. 562.)

Here, the agreed boundary doctrine is inapplicable because, at the time the figure of 6229.1 feet was established as a limitation on filling Lake Tahoe, and until recently, there was no extant controversy as to the boundary of public property rights, so no controversy was resolved. We know this, as a matter of law, because "with few exceptions, state authorities, including the

Attorney General, took the position until at least 1970 that by virtue of the provisions of [Civil Code] section 830 the state claimed ownership only to the low water mark. [Citations.]" (*Lyon*, supra, at p. 224.) The state first asserted claim to the lands at Lake Tahoe in 1977, whereupon this litigation was promptly filed. (*Fogerty*, supra, at p. 243.) Before the state's assertion of its claim in 1977, the owners had no reason to believe the figure of 6229.1 feet was anything more than a limitation on filling the reservoir. They had no cause to suspect it could have further significance as a property boundary for purposes of the public trust doctrine. The owners had no more reason to believe their property rights were being adjusted under the agreed boundary doctrine (by their acquiescence in a theoretical lake level of 6229.1 feet) than would the property owner who watches his neighbor build a fence on the neighbor's own land in order to comply with an ordinance requiring the construction of fences. (See Dooley's Hardware Mart v. Trigg, supra, 270 Cal.App.2d at pp. 339-340.) Thus, there was no controversy over property boundaries to be resolved by agreement. (*Id.*, at pp. 340-341.)

In the circumstances it would be manifestly unfair, if not disingenuous, to justify the imposition of public trust rights upon private owners' land on the basis that the owners, by their ignorance and inaction, somehow "agreed" to imposition of the public trust boundary at elevation 6229.1 feet. The trial court's high watermark may not be sustained under a theory of "agreed boundary."

C. The extent of the public trust must be established in accordance with a theory of prescriptive rights.

1. The doctrine of prescription will not support a high watermark of 6229.1 feet.

As we have noted, we read *Fogerty* as establishing that the People have acquired their public trust rights in the shorezone by prescription. Although the public trust may not be in all respects

identical to an easement,[9] we think the similarities are sufficient to justify resort to the law of prescriptive easements to set the upper boundary of the public trust. (See, e.g., Gilardi v. Hallam (1981) 30 Cal.3d 317, Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 41.)

Defendants contend a high watermark of 6229.1 feet has been established by prescription. However, we cannot agree.

"The elements necessary to establish a prescriptive easement are well settled. The party claiming such an easement must show use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years." (Warsaw v. Chicago Metallic Ceilings, Inc. (1984) 35 Cal.3d 564, 570; Code of Civ. Proc., § 321.) The purpose of these requirements is to insure that the owner of the real property which is being encroached upon has actual or constructive notice of the adverse use and to provide sufficient time to take necessary action to prevent that adverse use from ripening into a prescriptive easement. (Twin Peaks Land Co. v. Briggs (1982) 130 Cal.App.3d 587, 593; Zimmer v. Dykstra (1974) 39 Cal.App.3d 422, 431.)

Unlike waters which actually lap upon the shore, a high watermark which exists only on paper and not on the land is not a "use" of the land at all, much less an "open" one. (See Warsaw v. Chicago Metallic Ceilings, supra, 35 Cal.3d at p. 570.) A "paper" high watermark—particularly one unaccompanied by the assertion of any effect on property rights—cannot fulfill the notice purpose underlying the elements of prescription. (Twin Peaks Land Co. v. Briggs, supra, 130 Cal.App.3d at p. 593; Zimmer v. Dykstra, supra, 39 Cal.App.3d at p. 431.) As the court of appeal has colorfully said, an adverse user " ' "must unfurl his flag on the land, and keep it flying, so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest." ' " (Wood v. Davidson (1944) 62 Cal.App.2d 885, 890.) To continue the metaphor, merely filing the blueprints for a flagpole over at the irrigation district offices or at the federal

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[9] Thus, for example, *Lyon* apparently establishes that the uses of land subject to the public trust are broader than actual uses of the land previously by the public. (See *Lyon*, supra, 29 Cal.3d at p. 229.)

courthouse with the thought that, someday, the flagpole might be built, is not the sort of notice to which the landowner is entitled. The trial court erred in concluding that 6229.1 feet was the high watermark.

2. Application of the doctrine of prescription results in a high watermark of 6228.75 feet above sea level.

Fogerty's doctrine of prescriptive rights is derived from cases allowing the public to obtain property rights from the actual incursion of dam waters upon the shore. (See *Fogerty*, supra, 29 Cal.3d at p. 248; State v. Parker (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; State v. Sorenson (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) We shall therefore use the actual incursion of the waters to set the high level of Lake Tahoe. The question is: what is the appropriate level of actual incursion? Once again, we turn to the law of prescriptive easements for the answer.

"To acquire a prescriptive easement, the easement must be used in the required manner continuously and without interruption for the full prescriptive period [of five years]. The actual use required depends on the nature of the easement. It need not be used every day during the prescriptive period. The use is sufficient if it occurs on those occasions when it is necessary for the convenience of the user." (3 Miller & Starr, op. cit. supra, § 18:37, pp. 327-328.) "If a right of way over another's land has been used for more than five years, it is not necessary, to make good such use, that the claimant has used it every day. He uses it every day, or once in every week, or twice a month, as his needs require. He is not required to go over it when he does not need it, to make his use of the way continuous. The claimant is required to make such reasonable use of the way as his needs require." (Hesperia Land etc. Co. v. Rogers (1890) 83 Cal. 10, 11.)

In *Hesperia Land* our Supreme Court held that a user of a water ditch need not use the ditch year-round in order to satisfy the requirement of continuous use. It was sufficient that he used the ditch during the growing season and then only when he needed it. (*Ibid.*; see Twin Peaks Land Co. v. Briggs supra, 130 Cal.App.3d at p. 593.)

We find *Hesperia Land* directly analogous to the situation at bar. The need for water storage, like the need for water transportation in an irrigation ditch, fluctuates from season to season and ultimately from year to year. We believe it wholly unnecessary to the doctrine of prescription for water impounded behind a dam to remain in place continuously for the five-year period in order for prescriptive rights to attach. Practical experience tells us no reservoir operates that way. We believe, instead, that the needs of the reservoir operator are determinative. (Hesperia Land etc. Co. v. Rogers, supra, 83 Cal. at p. 11.) Where the reservoir operator returns the waters to a zenith each water year and maintains the water at that elevation for the duration of his needs his use of the reservoir is "continuous" up to and including that highest point. (*Ibid.*) For purposes of the public trust doctrine, we shall therefore set the high watermark of Lake Tahoe at the highest elevation actually reached by the "current" lake in five sequential years.

Applying this rule to the undisputed data contained in defendants' exhibit R is relatively straightforward. We must look to the lake's current conditions. (*Fogerty*, supra, 29 Cal.3d at pp. 248-249.) Thus, we consider the water levels after 1944 when the present mode of water level regulation was established. Examining defendants' exhibit R, we find that the five consecutive years of highest water since 1944 are years 1967, 1968, 1969, 1970, and 1971. In each of those five years, the lake has reached elevation 6228.75 feet.[10] This is a "continuous" use of the reservoir up to

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[10] The actual water levels were as follows:

1967	6228.87 feet
1968	6228.75 feet
1969	6229.05 feet
1970	6229.05 feet
1971	6228.99 feet

Needless to say, only the lowest of these five elevations has been reached *each* year.

Because the last year of the prescriptive period was 1971 we need not consider the effect, if any, of Civil Code section 1009 (effective 1972) which provides a means of protecting owners of private property who

that elevation for the purposes of prescriptive rights. (Hesperia Land etc. Co. v. Rogers, supra, 83 Cal. at p. 11.)

We acknowledge that the high watermark should be "ordinary" and should not represent the level reached by water in unusual floods. (*Lyon,* supra, 29 Cal.3d at p. 216; State v. Sorenson, supra, 271 N.W. at p. 236.) The undisputed data indicate the figure of 6228.75 feet is not markedly different from other elevations of the lake reached since 1944 and does not represent an inappropriate unusual condition of the lake.[11] We shall modify the trial court's judgment to establish the high watermark as 6228.75 feet above sea level, Lake Tahoe datum.[12]

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make their lands available to the public from later claims of prescriptive rights.

[11] For example, in years 1951, 1952, and 1953 the lake reached elevations 6228.89, 6228.79, and 6229.04 feet, respectively. Similarly, in years 1956, 1957, and 1958, the lake reached elevations 6229.04, 6229.07, and 6229.02 feet, respectively. In 1973, 1974, and 1975, the lake reached 6228.64, 6228.92, and 6228.64 feet, and in 1982, 1983, and 1984 the lake exceeded elevation 6228.50 feet.

[12] The parties have suggested various other methods that might be used to set the high level of the lake. However, none of the methods they suggest is consistent with the theory of prescriptive rights which provides the basis for the state's assertion of its public trust. (*Fogerty,* 29 Cal.3d at pp. 248-249.) We briefly summarize the proposed methods and their shortcomings.

The traditional method of ascertaining the high watermark in tidal waters is of little help. The height of the tides is determined primarily by the gravitational effects of the sun and the moon; these effects run one complete cycle every 18.6 years. The high tide is generally computed by averaging the high tides occurring over such a period of time. (Borax Consolidated v. City of Los Angeles (1935) 296 U.S. 10, 26-27 [80 L.Ed. 9].) This method is inconsistent with prescriptive rights obtained during a five-year period of time. Moreover, nontidal waters generally, and waters impounded behind a dam in particular, know of no tidal rhythmic regularity. Water stored in reservoirs, like that in uncontrolled lakes and streams, fluctuates with the weather but is also under the direct control of man. Thus, the 18.6 year average is of little utility.

Averaging the high watermarks set over a larger number of years is also inconsistent with the theory of prescriptive rights. Moreover, the

DISPOSITION

The judgment is modified to reflect that "the high watermark of Lake Tahoe constituting the uppermost limit of that lake subject to the public trust is located at 6228.75 feet above sea level, Lake Tahoe datum." As modified, the judgment is affirmed. (CERTIFIED FOR PUBLICATION.)

SIMS, J.

We concur:

BLEASE, Acting P.J.
CARR, J.

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method poses two additional problems: (1) determining the number of years over which to average (see, e.g., Willis v. United States (S.D. W.Va. 1943) 50 F. Supp. 99, 101-102; and (2) the danger that a landowner may have to endure excess encroachment in years of above-average waters.

Plaintiffs propose the method traditionally used in free-flowing rivers. The high watermark is defined as the place where the riverbed ends and the riverbank begins. (Howard v. Ingersoll (1851) 54 U.S. 381 [14 L.Ed. 189].) This method involves examining the riverbank to find the highest point where the water's flows have prevented the growth of vegetation. (See Harrison v. Fite (8th Cir. 1906) 148 F. 781, 783.) This method is premised on the assumption that the river will, over a period of time, predictably return to a certain level where it will leave an indelible mark upon its banks. This method is unacceptable for several reasons. First, resort to the physical characteristics of the riverbank is a method of ascertaining the historic levels of water where more accurate measurements are unavailable. Here, we have data accurate to two decimal points and need not rely on physical inspection of vegetation to tell how high the water has risen over time. Moreover, in a reservoir the water level is under the control of man and may fluctuate from month to month and from year to year in only a grossly predictable manner. Thus, the visible vegetation line may be a reflection of only recent events in the reservoir. We conclude the "vegetation test," like the mathematical averaging test, is unsuitable for present purposes.

Appendix B

Superior Court of the California
County of Placer

No. 48281

Charles F. Fogerty et al.,
Plaintiffs,

v.

State of California et al.,
Defendants.

Order for Entry of Summary Judgment in Favor of Defendants State Lands Commission and State of California

[Filed April 11, 1985]

The motion of defendants State of California and State Lands Commission for summary judgment or summary adjudication of issues without substantial controversy was heard by this Court in Department No. 3, before Honorable George Yonehiro, Judge, on April 1, 1985. Appearing as attorneys were Jan S. Stevens and David B. Judson for defendants and Edgar B. Washburn, Mary Beth Uitti for plaintiffs Charles F. Fogerty et al. and William T. Chidlaw for plaintiff Tahoe Shorezone Representation. After full consideration of moving and responding papers, all supporting papers including declarations, exhibits and discovery documents, all other documents filed herein, oral arguments of counsel, holdings of the California Supreme Court in *State v. Superior Court (Lyon)* (1981) 29 Cal. 210 and *State v. Superior Court (Fogerty)* (1981) 29 Cal. 240 and in accordance with the Peremptory Writ of Mandate issued by the California Supreme Court on October 3, 1983, which commands this Court to vacate its order of June 4, 1979, granting plaintiffs' partial summary judgment and to enter a new order granting the People's motion for partial summary judgment and partial judgment on the pleadings insofar as consistent with the views stated in that court's opinion filed March 20, 1981, the court finds that defendants have shown by admissible evidence and reasonable inferences therefrom and by judicial notice properly taken of those matters

requested by defendants in their moving papers, that there is no triable issue of any material fact remaining in this case and, therefore, defendants are entitled to judgment as a matter of law.

IT IS THEREFORE ORDERED that the order of this Court of June 4, 1979, granting plaintiffs' motion of March 1, 1979, for partial summary judgment is hereby vacated and defendants' motion for summary judgment filed herein on December 10, 1984, is granted and that judgment shall be entered in favor of defendants and against plaintiffs as follows:

1. Plaintiff landowners holding otherwise valid grants to the shores of Lake Tahoe hold to the low water mark thereof;

2. The title of littoral owners at Lake Tahoe is impressed with a public trust for commerce, navigation, fisheries and environmental preservation to the high water mark thereof;

3. The state may not be estopped from asserting the rights of the public to the high water mark at Lake Tahoe;

4. The high and low water marks at Lake Tahoe are to be determined in accordance with the current condition of that lake;

5. The low water mark of Lake Tahoe constituting the boundary between state sovereign ownership and upland fee ownership is located at 6223 feet above sea level, Lake Tahoe datum;

6. The high water mark of Lake Tahoe constituting the uppermost limit of that lake subject to the public trust is located at 6229.1 feet above sea level, Lake Tahoe datum;

7. Any right of the plaintiffs herein to pier out to the line of navigation in Lake Tahoe is subject to the authority of the State of California and its designees to impose reasonable regulations;

8. Plaintiffs holding property littoral to the bed of Lake Tahoe have not been deprived of the use or enjoyment thereof without compensation, contrary to the provisions of article 1, section 19, of the state Constitution and amendments V and XIV of the United States Constitution.

DATED: April 11, 1985

GEORGE YONEHIRO
Judge of the Superior Court

Appendix C

In The Supreme Court of the State of California

S.F. No. 24035

THE STATE OF CALIFORNIA et al., Petitioners v. THE SUPERIOR COURT OF PLACER COUNTY, Respondent; CHARLES F. FOGERTY et al., Real Parties in Interest.

[Filed Mar. 20, 1981]

OPINION

MOSK, J.—The present action is concerned with the ownership of lands between high and low water in Lake Tahoe, a navigable lake in which there is no appreciable ebb and flow of the tide. The primary issues are the same as those discussed in *State of California v. Superior Court (Lyon), ante,* page 210 [..... Cal.Rptr. ....., ... P.2d .....], but some questions in addition to those in the *Lyon* action are raised by the parties.

In the spring of 1977, the State Lands Commission, after being advised by the Attorney General that the state claimed ownership of the property between high and low water in navigable nontidal lakes and rivers, proposed to record claims to such lands in the offices of county recorders throughout the state.

Thereupon, Charles and Stella Fogerty and other owners of property along the shore of Lake Tahoe, and Tahoe Shorezone Representation, a corporation which represents many shoreline owners, filed this action for declaratory relief and inverse condemnation, and claimed violation of

their civil rights (42 U.S.C. § 1983).[1] The complaint alleged that plaintiffs owned the lands between high and low water in the lake in fee simple, that many of them had built piers or docks extending to low water, and that the state wrongfully asserted title or a public trust to high water. Plaintiffs sought an injunction to prevent the state from claiming any interest in the property between high and low water. As defendants in the action, they joined the state, the State Lands Commission, and several state officials (hereinafter called the People).

After overruling the demurrers of the People and granting plaintiffs a preliminary injunction prohibiting the state from recording a notice that it owns the lands between high and low water in Lake Tahoe, the trial court granted plaintiffs' motion for partial summary judgment. It ruled that no portion of the property involved in this action landward of the last natural low water mark of Lake Tahoe is or ever was sovereign property of the state or subject to the common law public trust for commerce, navigation and fishing, and it denied the motions for partial summary judgment and for partial judgment on the pleadings filed by the People. Thereafter, the People filed this proceeding, seeking a peremptory writ of mandate to direct the trial

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[1]Section 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

court to vacate its order granting plaintiffs' motion, and to enter an order granting the motions made by the People.

The major issue raised by the plaintiffs, not discussed in *Lyon*, is that of estoppel. Strictly speaking, that issue is not formally before us. Plaintiffs' complaint pleads a cause of action for declaratory relief in estoppel, but their motion for partial summary judgment did not seek a ruling on this issue, and the trial court did not pass upon the question. The People, urging that plaintiffs should not be permitted to raise the issue, assert that estoppel is a question of fact for the trial court in any future proceeding. This argument is technically tenable. But if estoppel were to be determined on a case-by-case basis it would require a massive expenditure of time and money by the state, riparian landowners, and the judiciary. Such an effort may be avoided if, as we shall conclude, we can decide the question as a matter of law on the basis of the present record. (Cf. *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 487-488 [91 Cal.Rptr. 23, 476 P.2d 423].)

The elements of equitable estoppel were described so thoroughly by Justice Sullivan in *Mansell* that little more need be said on the subject.[2]

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[2]There are four elements necessary to apply the doctrine: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury." (3 Cal. 3d at p. 489.)

We note that the opinion of the Attorney General referred to in *Lyon* declares that the public trust applies to the land in question (43 Ops.Cal.Atty.Gen. 288, 294 (1964)), and that it has long been

Since we find that one critical requirement for the application of the doctrine is absent, we need not discuss other aspects of the doctrine or their relevance to the present case. Estoppel will not be applied to the government if the result would be to nullify a strong rule of policy adopted for the benefit of the public (*Mansell*, 3 Cal.3d at p. 493), and we entertain no doubt that this would be the result if we were to hold that the People are barred from asserting the public trust in the lands at issue.

As we point out in *Lyon*, our decision will affect the rights of the public in 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers, and many thousands of acres of land between high and low water (the shorezone). Amicus curiae in the *Lyon* action, the California Department of Water Resources, points out that the shorezone has been reduced to a fraction of its original size in this state by the pressures of development. Such lands now cover less than one half of 1 percent of the state; a further reduction by 15 percent was projected for 1980. Some authorities have warned that at the present rate of destruction nearly all riparian vegetation on the Sacramento River could be eliminated in the next 20 years.

The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish (including salmon, steelhead and

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settled in this state that the fact a private landowner has title to tidewaters does not establish such ownership is free of the interest of the public. (See, e.g., *People v. California Fish Co.* (1913) 166 Cal. 576 [138 P. 79].)

striped bass), birds (such as the endangered species: the bald eagle and the peregrine falcon), and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.

The close relationship of the life forms in the shorezone to one another and to the condition of the bed of the stream or lake, the delicate balance among them, and the adverse effects of reclamation and development of these areas have been documented in numerous studies and reports. (E.g., U. S. Dept. of Agr., Forest Service (1973) Gen. Plan for Management of Nat. Forest Lands, Lake Tahoe Basin. Review Draft. Lake Tahoe Management Unit, South Lake Tahoe. pp. 1-2: Cal. Dept. Fish and Game (1974) Fish and Wildlife Res. of Anderson Marsh, Clear Lake, Lake County: Cal. Dept. Fish and Game (1966) 1 Fish and Wildlife Plan. p. 14.) One commentator has observed: "[T]he argument is now commonplace that these environments are the earth's most biologically productive . . . If nature bats last, wetlands may be the natural team's designated hitter." (*Nash, Who Loves a Swamp?* in Strategies for Protection and Management of Floodplain Wetlands, etc., a Symposium (USDA Forest Service, GTR-WO-12, Dec. 11-13, 1978.)) The recreational use of these areas for picknicking, hunting, fishing, hiking, birdwatching and nature study does not require elaboration to any Californian. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], Justice McComb made the following comment for a unanimous court regard-

ing the public uses of tidelands: "There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is a preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." That observation is equally applicable to the shorezone.

The Legislature has recognized the value of the shorezone by enacting statutes calling for its protection. (Pub. Resources Code, §§ 5093.50, 5811.) Section 5811 provides that "the remaining wetlands of this state are of increasingly critical economic, aesthetic, and scientific value to the people of California, and . . . there is need for an affirmative and sustained public policy and program directed at their preservation, restoration, and enhancement, in order that such wetlands shall continue in perpetuity to meet the needs of the people."

We are not convinced by the assertion that these considerations do not rise to the level of a strong public policy in favor of retaining the public trust in the shorezone. Plaintiffs argue that a large percentage of the shoreline of Lake Tahoe is presently devoted to public use either because of public ownership or the public utilization of privately owned shoreline facilities such as marinas, that the problems at Lake Tahoe are related to a large influx of people which contributes to the pollution of the lake, that the public beach areas are overused and the

forest cover destroyed by motor vehicles, and that the best preserved areas of the lake are in private ownership. Thus, they urge, the public interest in preservation of the scenic beauty of the lake would be enhanced by private rather than public ownership of the shorezone. Moreover, it is argued, owners are limited in their use of the shorezone by many regulations designed to protect the ecology of the area,[3] and these are adequate to protect the public's interest.

Amicus curiae, the California Land Title Association, in a brief filed in the *Lyon* action, asserts that the People exaggerate the ecological importance of the shorezone since not all shorezone areas are of ecological importance, some of the most significant being located above high water or below low water. It is also argued that the imposition of a trust on behalf of the public will not necessarily provide the ecological benefits which the People envision. That goal can be better accomplished on a project-by-project basis in which ecological concerns can be dealt with and private improvements prohibited, lim-

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[3]For example, state law requires mitigation of adverse environmental effects of a project (Pub. Resources Code, § 21000 et seq.), development which will obstruct the flow of a river or lake or which uses material from a stream bed must be approved by the Department of Fish and Game to determine whether it will adversely affect fish and wildlife (Fish & G. Code, § 1603); the California Tahoe Regional Planning Agency has broad powers to enact ordinances for the regulation of improvement at the lake (Gov. Code, § 67100), and 10 percent of the wetlands in the state are protected by a law providing for the formulation of a plan to control development of Suisun Marsh (Pub. Resources Code, § 29000 et seq.).

ited, or modified, depending on the ecological needs of the area involved.

Whether or not the shorezone of Lake Tahoe would be better preserved if privately owned than if the public has an interest therein is not determinative, since we are not concerned here with recreation only, nor with Lake Tahoe alone, but with a principle which will apply to 4,000 linear miles along all the navigable lakes and rivers in California, in many of which the conditions may well differ in some respect from those at Lake Tahoe. Preservation of the public trust in the shorezone will allow the state flexibility in determining the appropriate use of such land, so that, for example, areas which are endangered by overuse can be closed to certain activities such as public bathing. A number of the considerations advanced by plaintiffs and amicus would call also for abdication of the tidelands trust and the substitution of regulation of tidelands development for the concept of the public's right to control such lands as a matter of right. These arguments appear to oppose the established public trust doctrine in principle, rather than its application to the shorezone as such.

The exercise of the police power has proved insufficient to protect the shorezone. The urgent need to prevent deterioration and disappearance of this fragile resource provides ample justification for our conclusion that the People may not be estopped from asserting the rights of the public in those lands.

One question remains: whether the boundary between public and private ownership should be determined with reference to Lake Tahoe in its current condition, or the

"natural" level of the lake as it existed prior to the construction of a dam in 1870, which had the effect of raising the level of the lake. (See 30 Ops.Cal.Atty.Gen. 262, 267-268 (1957).) The trial court concluded that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" low water mark of the lake. Plaintiffs argue in favor of the trial court's ruling, while the People assert that the boundary should be fixed by assessing the lake in its current condition.

There is no direct authority on this issue in California. While there is authority relating to a landowner's right to accretions and relictions[4] and to the maintenance of a body of water at its existing level,[5] the issue in the present case revolves around rights in land between the natural water level of a lake and its current shoreline as raised by a dam constructed many decades ago. The People point

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[4]Section 1014 of the Civil Code provides that where land forms by imperceptible degrees from natural causes upon a river or stream by accumulation of material or the recession of the stream, it belongs to the owner of the bank. In *Carpenter v. City of Santa Monica* (1944) 63 Cal.App.2d 772, 794 [147 P.2d 964], the court refused to apply this statute to tidelands, deciding that artificial accretions to tidelands belong to the state, because to hold otherwise would indirectly convey public tidelands into private ownership.

[5]Some cases hold that a landowner has a vested interest in a long-continued diversion of water by the state if he has made substantial expenditures in reliance upon the diversion (*Natural Soda Prod. Co. v. City of L. A.* (1943) 23 Cal.2d 193, 197 [143 P.2d 12]; *Chowchilla Farms Inc. v. Martin* (1933) 219 Cal. 1, 18 [25 P.2d 435]), and that he may recover damages if the level of a lake is lowered (*City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460, 472 [52 P.2d 585]).

out that it would be difficult (and probably impossible in some cases) to reconstruct the natural water level of a lake. There are hundreds of dams in California, some dating back to the early days of statehood. (Dept. of Wat. Resources, Dams Within Jurisdiction of State of Cal. (1976) Bull. No. 17-76.) The monumental evidentiary problem which would be created by measuring the boundary line between public and private ownership in accordance with the water level which existed prior to the construction of these dams provides a convincing justification for accepting the current level of the lake as the appropriate standard.

Moreover, the dam at Lake Tahoe has been in existence since 1870, long past the period required for the acquisition of prescriptive rights by the state in the lands in question. (Civ. Code, § 1007; Code Civ. Proc., § 325.) It has been held in other jurisdictions that a landowner loses ownership of property covered by water resulting from the construction of a dam if the condition has continued for the period required for the acquisition of prescriptive rights. (*State v. Parker* (1918) 132 Ark. 316 [200 S.W. 1014, 1016]; *State v. Sorenson* (1937) 222 Iowa 1248 [271 N.W. 234, 238-239].) *Sorenson* stated that in these circumstances "the artificial condition is . . . stamped with the character of a natural condition, and the title to the lands covered by the waters of the lake is deemed to have passed from private ownership to the same trust as that of lands covered by the waters of natural navigable lakes. The state, and private owners, as well, of lands affected by the artificial condition, may enforce the maintenance of that condition." (Cf. *Chowchilla Farms Inc. v. Martin*,

supra, 219 Cal. 1, 18; *Natural Soda Prod. Co. v. City of L. A., supra*, 23 Cal.2d 193, 197.)

We hold that, under all the circumstances, the trial court erred in its conclusion that the "last natural" low water mark of Lake Tahoe is the appropriate standard by which to measure the boundary between public and private ownership.

We emphasize, as we did in *Lyon*, that these plaintiffs may use the shorezone for any purposes which are not incompatible with the public trust. Landowners who have previously constructed docks, piers and other structures in the shorezone may continue to use these facilities unless the state determines, in accordance with applicable law, that their continued existence is inconsistent with the reasonable needs of the trust. In that event, both statute and case law require that plaintiffs be compensated for the improvements they have constructed in the shorezone. (Pub. Resources Code, § 6312; *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 455 [36 L.Ed. 1018, 1043, 13 S.Ct. 110]; *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 534 [162 Cal.Rptr. 327, 606 P.2d 362].)

Let a writ of mandate issue directing the trial court to vacate its order granting plaintiffs partial summary judgment, and to grant the People's motion for partial summary judgment and partial judgment on the pleadings, insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

CLARK, J., Dissenting.—For the reasons stated in my concurring and dissenting opinion in *State of California v. Superior Court (Lyon)*, *ante*, page 210, [..... Cal.Rptr. .....,

..... P.2d .....], the public trust declared today by the majority applies only to tide and submerged lands and does not apply to the shorezone. While the shorezone at Lake Tahoe may be a ring around the lake only a few feet in width, shorezones on navigable streams encompass hundreds of square miles which are presently in productive use for other than trust purposes, and we should not at this late date declare such uses unlawful.

I must also dissent from the majority's conclusion that the People may not be estopped from asserting the trust. The holding of the sole authority relied on by the majority, *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423], is directly contrary to today's decision.

In *Mansell*, the City of Long Beach had claimed portions of a residential subdivision were tidelands subject to the trust. Estoppel was urged on the ground: "[T]he subject lands were filled and improved with the knowledge and acquiescence of the state and city and . . . since annexation of the area in 1923 the city has exercised full municipal jurisdiction over it—granting building permits, approving subdivision maps, constructing and maintaining streets and city services, collecting taxes." (*Id.*, at p. 487.)

This court first discussed estoppel as applicable to private parties in land title cases, concluding that the circumstances would be sufficient to estop private claims. The court continued: "It is settled that '[t]he doctrine of equitable estoppel may be applied against the government where justice and right require it. (*United States Fid. & Guar. Co. v. State Board of Equalization* (1956) 47 Cal.2d

384, 388-389 [303 P.2d 1034] and cases there collected.)' (*Driscoll v. City of Los Angeles, supra,* 67 Cal.2d 297, 306 [61 Cal.Rptr. 661, 431 P.2d 245].) (See generally 28 Am.Jur.2d, Estoppel and Waiver, §§ 122-133, pp. 782-802; 31 C.J.S., Estoppel, §§ 138-147, pp. 675-733.) Correlative to this general rule, however, is the well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . . ' (*County of San Diego v. Cal. Water etc. Co.* (1947) 30 Cal.2d 817, 829-830 [186 P.2d 124, 175 A.L.R. 747], see also cases there cited.) The tension between these twin principles makes up the doctrinal context in which concrete cases are decided." (*Id.*, at p. 493.)

After lengthy discussion of the leading cases on the issue of estoppel against government, *Mansell* distilled the controlling rule: "After a thorough review of the many California decisions in this area, as well as a consideration of various out-of-state decisions, we have concluded that the proper rule governing equitable estoppel against the government is the following: The government may be bound by an equitable estoppel in the same manner as a private party when the elements requisite to such an estoppel against a private party are present and, in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel." (*Id.*, at pp. 496-497.)

The court concluded that the great injustice to homeowners which would result from failure to uphold an

equitable estoppel against the state and city justifies the minimal effect upon public policy resulting from raising an estoppel. (*Id.*, at p. 501.)

The majority in the instant case rely upon the language quoted above that "an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public, . . .'" The majority conclude that establishing trust rights to the shorezone is so important that the People may not be estopped as to thousands of linear miles of shorezone. (*Ante*, pp. .....)

The majority decision is arbitrarily contrary to *Mansell*. That case established that in appropriate circumstances the People could be estopped to assert the trust, when the resulting injustice would outweigh the public policy. There are no doubt, thousands of homeowners in cities of the Sacramento and San Joaquin Valleys, as well as other areas of the shorezone, in substantially the same position as were the homeowners in Long Beach. These homeowners, and thousands of farmers will suffer thousands of "great injustices," clearly outweighing the public trust loss in respect to individual lands. (3 Cal.3d at p. 501.)

While it would be a tremendous burden on the judicial system to determine in individual cases whether imposition of the trust involves "great injustice" outweighing trust detriment, the courts' business is the administration of justice. However burdensome the alleviation of "great injustice" may be, courts should not shirk their duty.

I would deny mandate.

Richardson, J., concurred.

Appendix D

In The Supreme Court of the State of California

[S.F. No. 23981, Mar. 20, 1981.]

THE STATE OF CALIFORNIA et al., Petitioners, v. THE SUPERIOR COURT OF LAKE COUNTY, Respondent; RAYMOND R. LYON et al., Real Parties in Interest.

OPINION

MOSK, J.—In *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515 [162 Cal.Rptr. 327, 606 P.2d 362], we reaffirmed the ancient doctrine that tidelands—lands between the lines of mean high tide and mean low tide—are owned by the public, that the state holds these lands in trust for the people for their use for commerce, navigation, fishing and other purposes, and that this trust interest is retained even if the title to tidelands has been conveyed to private persons, unless the conveyance has been made to promote the purposes of the trust.

The present case also concerns lands along the shoreline, but the issue here is the boundary between state and private ownership in non-tidal, navigable lakes and streams between high and low water, i.e., lands alternately covered and uncovered by water as the level of the lake rises and falls with the seasons. The Attorney General, representing the People, claims that these lands are owned by the state, which acquired title thereto by virtue of its sovereignty upon admission to the Union, that they have not been conveyed to the owners of the lands along the shoreline, and that even if such conveyances have been made, the

lands in dispute are subject to the trust described in *City of Berkeley.*

Raymond R. Lyon and Margaret L. Lyon, real parties in interest (hereafter called Lyon) own 800 acres along the shore of Clear Lake in Lake County, a navigable body of water with an area of about 64 square miles. The portion of the property involved in the present dispute consists of more than 500 acres of marshland at the southern end of the lake, known as the Anderson Marsh, most of which is covered by water at certain times of the year. Lyon's predecessors in interest purchased the property from the state under patents issued between 1850 and 1906. These grants did not specify the waterward boundary of the land conveyed. Lyon sought to develop the property and applied for a permit to repair a levee for the purpose of reclaiming a portion of the marsh. The Fish and Game Commission notified him that it could not process his application for a permit because the State of California claimed ownership of the portion of the marsh which extends below the high water mark.

Lyon filed an action against the state and various of its agencies,[1] seeking to quiet title to the marsh, and for declaratory relief. He relied, inter alia, upon section 830 of the Civil Code.[2] This section, which was adopted in 1872, provides "Except where the grant under which the land is held indicates a different intent, the owner of the

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[1]Lyon joined the Department of Fish and Game and the State Lands Commission in the action. The commission has jurisdiction over the beds of navigable waters owned by the state or in which the state has an interest. (Pub. Resources Code, § 6301.)

[2]All references are to the Civil Code unless otherwise noted.

upland, when it borders on tide-water, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

The People filed a cross-complaint to quiet title in the state to the portion of the Anderson Marsh between high and low water and for declaratory relief. The County of Lake intervened in the action in its capacity as grantee in trust of the state's interest in the lands underlying the lake. (Stats. 1973, ch. 639, § 1, p. 1165.) The county supported Lyon's claim that he owns the property to the line of low water.

Lyon, the county, and the People, all moved for partial summary judgment based on their respective claims. The trial court ruled in favor of Lyon and the county (hereafter sometimes collectively referred to as Lyon); it determined that no portion of the Anderson Marsh lying landward of the ordinary low water mark of Clear Lake is sovereign property of the state or subject to a common law public trust, but that the waters of the lake are impressed with a public servitude so that when the water rises above the low water mark, the public has the right to navigate between that line and the ordinary high water mark. The People seek a writ of mandate to compel the trial court to vacate its order, and to grant the People's motion for partial summary judgment.

The case involves issues which are of vast importance to the general public as well as to the owners of land bordering

upon navigable lakes and streams. The significance of these issues has generated extensive briefs by amici curiae,[3] and their analyses and arguments have been of considerable assistance to the court. No less than 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers in the state are involved. Substantial areas of land will be affected by our decision: at Clear Lake alone, there is a difference of 5,000 acres in the surface area of the lake between high and low water, and the Anderson Marsh constitutes one-half of the remaining fresh water marsh at Clear Lake. Lands of the type involved in this proceeding constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state.

Lyon's claim to the fee ownership of Anderson Marsh to the low water line is based on the following reasoning: California never acquired title to the beds underlying navigable nontidal waters above low tide. The United States Supreme Court has made it plain that the ownership of such lands is a matter of state rather than federal law. (*Hardin v. Jordan* (1891) 140 U.S. 371, 382 [35 L.Ed. 428, 433, 11 S.Ct. 808]; *Barney v. Keokuk* (1876) 94 U.S. 324, 338 [24 L.Ed. 224, 228].) The states exercised their options with regard to ownership of such land by adopting

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[3]The Department of Water Resources has filed an amicus brief in support of the People, as have the Sierra Club and the Natural Resources Defense Council (joint brief) and the Audubon Society and Friends of the Earth (joint brief). The California Land Title Association and the California Association of Realtors (hereafter referred to as California Land Title Association) have filed a joint brief on behalf of Lyon, and the Upper San Joaquin River Association also supports Lyon's position.

different rules; some states claim only to low water, some to high water, and others make no sovereign claim to the beds of nontidal bodies. Indeed, only a minority of states claim sovereign ownership to high water.[4] When California entered the Union, it determined to exercise no sovereign claim to the beds of nontidal navigable waters. This choice was made when, upon admission to statehood, the Legislature adopted a statute which provided that unless inconsistent with applicable federal or state law, the "Common Law of England shall be the rule of decision in all Courts of this State." (Stats. 1850, ch. 95, p. 219.) Under English common law, the sovereign made no claim to ownership of lands underlying nontidal waters. Therefore, by the adoption of the English common law, California made no claim to ownership of the beds of such waters. Subsequently, by the enactment of section 830 in 1872, the state determined to claim title only to low water.

The People contend, on the other hand, that California acquired title to the lands in question to the high water mark in its sovereign capacity upon statehood, citing, inter alia, *State Land Board v. Corvallis Sand & Gravel Co.* (1977) 429 U.S. 363, 370-371 [50 L.Ed.2d 550, 558-559, 97 S.Ct. 582]; *Barney v. Keokuk, supra*, 94 U.S. 324, 338. Moreover, argue the People, section 830 did not grant such lands to private persons because that provision only sets forth a rule for the construction of deeds and does not constitute a grant of sovereign land.

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[4]Approximately 20 states adopt a low water line for navigable lakes and rivers, a few allow private ownership to the middle of the water, and other jurisdictions have adopted different rules for lakes and rivers. Ten jurisdictions have adopted the high water rule. (See fn. 9 at p. , *post.*)

We consider, first, whether California acquired sovereign ownership in the lands between low and high water in nontidal, navigable lakes and rivers upon admission to the Union. If this question is answered in the negative, the People's claim to fee ownership of these lands cannot prevail. If, on the other hand, the state owned the property in question at the time of admission to the Union, it will be necessary to decide whether, by the enactment of section 830 in 1872, it granted an interest therein to riparian landowners and, if so, the extent of the interest conveyed.

We begin with the proposition that, even accepting Lyon's assertion that the state did not automatically succeed to title to the beds of navigable nontidal lakes and streams to high water upon statehood but only had the option to make such a claim, absent an indication that the new state declined to exercise sovereign ownership of such lands, we would be compelled to decide the issue in favor of the state's title. The only basis for a claim that California abdicated its rights to claim to high water in 1850 was the adoption of the common law of England as the rule of decision in this state.[5]

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[5]The disagreement between the parties in this regard appears to focus not upon the question whether the state had the power to grant these lands to private persons, but upon when such power was exercised, i.e., when California entered the Union or thereafter. The People urge that the state succeeded to the ownership of the lands in question to high water as an inherent aspect of sovereignty, although sovereignty implies that after admission to the Union the state had the power to grant them to private persons. Lyon argues, on the other hand, that California never owned these lands but only had the option to claim ownership, and when it was admitted to the Union, by the adoption of the common law in 1850 and section 830 in 1872, the state elected not to exercise its right to claim ownership of the land between low and high water.

In England, there were different rules concerning the ownership by private persons of the beds of tidal waters and nontidal waters. Nontidal rivers and lakes were privately owned; a riparian holder took to the middle of the lake or the thread of the stream, much like the landowner along a public street. At the same time, the beds of all navigable waters were said to belong to the crown, and the King held such property in trust for the public and could not dispose of it free of that trust. Only waters where the tide ebbed and flowed were considered to be navigable in England. The reason for the difference in these rules is readily explainable: in England there were no navigable streams of any importance beyond the ebb and flow of the tide. Therefore, the terms "navigable" and "tidal" became synonymous; tidal (navigable) waters came to mean public waters, while nontidal (and in England nonnavigable) waters came to mean private waters. (*The Propeller Genesee Chief et al. v. Fitzhugh et al.* (1851) 53 U.S. (12 How.) 443, 454-458 [13 L.Ed. 1058, 1063-1065]; *Barney v. Keokuk, supra*, 94 U.S. 324, 338.)[6]

Some of the original 13 states adopted the common law rule early in their history, for the same reason that the rule was appropriate in England, i.e., most of their waters were tidewaters, and until the use of steamboats "there could be nothing like foreign commerce upon waters with

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[6]The People contend that although the common law rule has generally been assumed to be as described above, there is some authority for the proposition that the tidal character of a body of water was not a critical factor in England in the determination of navigability. Numerous cases in addition to those referred to above support our characterization of the English rule. We need not discuss the authorities upon which the People rely, since we shall conclude that the common law test was not adopted in California.

an unchanging current resisting the upward passage." (*The Propeller Genesee Chief*, 53 U.S. at p. 455 [13 L.Ed. at p. 1063].) However, the English rule was obviously inappropriate as the nation expanded westward, where there were great rivers and lakes which were navigable in fact, even though they were not subject to the ebb and flow of the tide. These distinctions, and the inapplicability of the common law rules to conditions in much of the United States were recognized as early as 1851 by the United States Supreme Court. In *The Propeller Genesee Chief* it was held that the federal government had admiralty jurisdiction in rivers and lakes which were navigable in fact, whether or not the tide ebbed and flowed therein. In 1856, the courts of this state recognized that the tidal character of a body of water was not a proper test of navigability. (*American Water Co. v. Amsden* (1856) 6 Cal. 443, 446.)

The question of public ownership of navigable rivers and lakes was discussed in *McManus v. Carmichael* (1856) 3 Iowa 1. That case, which involved the boundary of public ownership along the Mississippi River, contains an exhaustive analysis of the common law rule of England and its application by early American courts. The court held that only those parts of the common law which were suitable to the conditions in Iowa were adopted by the new state. The opinion asks, rhetorically and somewhat floridly, "whether the rules and tests which are applicable enough to the rivulets of England, shall be taken to measure those waters whose flow is through the climates and zones of the earth?" (*Id.* at p. 31.) Needless to say, it held that the state owned the beds of navigable, nontidal bodies to

high water, and that the common law rule was inappropriate to the United States because the great nontidal rivers and lakes in this country are navigable in fact. Other states recognized the inapplicability of the English rule to conditions in this country prior to 1850. (E.g., *Carson v. Blazer* (Pa. 1810) 2 Binn. 475, 484-486; *Cates v. Wadlington* (S.C. 1822) 1 McCord 580, 582.)

In *Barney v. Keokuk, supra,* 94 U.S. 324, the high court considered the rule declared in *McManus,* and left no doubt the correct doctrine was laid down by that case, i.e., that the states own the beds of navigable, nontidal bodies to high water, and that the common law is inapplicable to conditions in the United States. Nevertheless, it held that states which had adopted the common law rule had the power to determine whether "as rules of property" it would be safe to change their adherence to the common law. After reaching these conclusions, the court made a statement upon which Lyon places great reliance: "If they [the states] choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (*Id.* at p. 338 [24 L.Ed. at p. 228].) Later cases repeated the proposition that the states are free to determine the ownership of lands below high water mark in navigable, nontidal lakes and streams. (*Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433]; *Shively v. Bowlby* (1894) 152 U.S. 1, 40 [38 L.Ed. 331, 346, 14 S.Ct. 548].)

With this background, we consider whether we are compelled to conclude, as Lyon asserts, that by the adoption of the English common law in 1850, California accepted

the rule of private ownership of nontidal navigable waters so that title to their beds was never in the state but was granted directly to private riparian owners. We do not so conclude.

First, our courts have never adhered slavishly to common law doctrines if they were unsuitable to the circumstances of our people or if the conditions were those never contemplated by the common law. (*Van Ness v. Pacard* (1829) 27 U.S. (2 Pet.) 137, 143-144 [7 L.Ed. 374, 376-377]; *Jones v. California Development* (1916) 173 Cal. 565, 573-574 [160 P. 823].) *Crandall v. Woods* (1857) 8 Cal. 136, 142-143, referred to the English test of navigability as a rule "framed with special reference to the physical condition of a country differing widely from our own." The law is replete with situations in which this and other jurisdictions which adopted the common law have refused to follow those aspects which were unsuitable to local conditions. (See Traynor, *Statutes Revolving in Common-Law Orbits* (1968) 43 State Bar J. 509, 518 et seq.; Hall, *The Common Law* (1951) 4 Vand.L.Rev. 791, 805 et seq.) If we were to hold, as Lyon urges, that the adoption of the common law in 1850 signified the acceptance in this state of the English rule regarding the ownership of the lands in question, we would "apply a rule founded on a particular reason, to a case where that reason utterly fails." (*Crandall* at p. 143.)[7]

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[7]Lyon appears to argue that because *The Propeller Genesee Chief* was not decided until 1851, the year after California entered the Union, and *Barney* was not decided until four years after section 830 was enacted into law, the holdings of these cases may not be considered in deciding whether California, by adopting com-

Rejection of the common law rule is also supported by the enactment of section 830 in 1872. As we have seen, under English common law, a riparian landholder owned land beneath nontidal waters to the middle of the lake or the thread of the stream; the King had no ownership interest in such lands. Under the terms of section 830, according to Lyon, the boundary between public and private ownership was set at the low water line. If we were to accept Lyon's assertion, we would be led to the entirely irrational conclusion that, although California, by the adoption of the common law in 1850, granted fee title to lands beneath navigable nontidal waters to the center line, 22 years later it deprived riparian owners of their property to the center by the enactment of section 830, and decreed that henceforth they owned only to the low water mark.[8]

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mon law rules, intended to relinquish the state's right to claim ownership of the beds of navigable, nontidal waters. We cannot agree. These cases and many others (including some cases cited above decided before 1850) demonstrate that the common law rule regarding nontidal waters is inappropriate to conditions in this state. The concept that only common law doctrine applicable to local conditions has been incorporated into our law is as old as the state itself.

[8]*Wright v. Seymour* (1886) 69 Cal. 122, 127 [10 P. 323], is relied upon by Lyon for the proposition that section 830 merely codified the common law. It is true that the decision states the section is a "declaration of the law . . . as it has existed since the formation of our state government." However, this statement was made with reference to the portion of section 830 relating to tidal waters.

Lyon does not directly discuss the inconsistency between his assertions regarding the common law and the effect of section 830. He claims that the state "may have followed the English common law prior to 1872, and made no claims to the beds of non-tidal navigable waters," and that section 830 "finally resolved any uncertainty about prior common law rules in California." The problem with this approach is that it skirts the critical issue whether the state or

Finally, we observe that the jurisdictions which hold the high water line to be the boundary between private and public ownership have also adopted the common law as the rule of decision.[9] These cases demonstrate that there is an inconsistency between not accepting the English rule regarding the ownership of the beds of nontidal, navigable lakes and rivers and the adoption of the common law as the rule of decision.

The conclusion follows that California succeeded to the ownership of the beds of such waters upon its admission to the Union, to the high water mark.

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private persons owned the beds of navigable, nontidal bodies to high water between 1850 and 1872. If California followed the English common law, then private persons owned these lands to the center line and were deprived of their property between that line and low water by the enactment of section 830. If, as we conclude above, the common law rule was not adopted in this respect, then the lands were owned by the state to high water, at least until 1872. Amicus curiae California Land Title Association, recognizing this anomaly, asserts that enactment of section 830 amounted to an unconstitutional taking of lands of riparian owners between the center line and low water mark.

[9]Alaska (*State, Dept. of Natural Resources v. Pankratz* (1975) 538 P.2d 984, 988); Arizona (*State v. Bonelli Cattle Company* (1971) 107 Ariz. 465 [489 P.2d 699, 701-702], revd. on other grounds (1973) 414 U.S. 313 [38 L.Ed.2d 526, 94 S.Ct. 517], overruled in *Corvallis Sand & Gravel Co., supra*, 429 U.S. 363, 382 [50 L.Ed.2d 550, 565]); Arkansas (*Anderson v. Reames* (1942) 204 Ark. 216 [161 S.W.2d 957, 959]); Florida (*Martin v. Busch* (1927) 93 Fla. 535 [112 So. 274-283]); Idaho (*Gasman v. Wilcox* (1934) 54 Idaho 700 [35 P.2d 265, 266]); Kansas (*Siler v. Dreyer* (1958) 183 Kan. 419 [327 P.2d 1031, 1033]); Oklahoma (*State v. Nolegs* (1914) 40 Okla. 479 [139 P. 943, 946]); Oregon (*Brusco Towboat Co. v. State, By and Through Straub* (1977) 30 Ore.App. 509 [567 P.2d 1037, 1040, 1042]); Utah (*Provo City v. Jacobson* (1947) 111 Utah 68 [181 P.2d 213, 214]; Washington (*State v. Superior Court* (1912) 70 Wash. 442 [126 P. 945, 947]).

We next consider whether the Legislature granted the lands in question to private persons by the enactment of section 830 in 1872. We do not doubt that the state had the power to make such grants. (See, e.g., *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 375 [50 L.Ed.2d 550, 561]; *Barney v. Keokuk, supra,* 94 U.S. 324, 338; *Hardin v. Jordan, supra,* 140 U.S. 371, 382 [35 L.Ed. 428, 433].) The question is whether section 830 was intended to accomplish this result.

As we have seen, the section provides that "[e]xcept where the grant under which the land is held indicates a different intent, the owner of the upland, . . . when it borders upon a navigable lake or stream, where there is no tide, . . . takes to the edge of the lake or stream, at low water mark. . . ."[10] Section 830 was a part of the Field Code, and when it was enacted in 1872, the Legislature added section 670 as well as section 2077 of the Code of Civil Procedure. Section 670 provides that the state is the owner of "all land below the water of a navigable lake or stream. . . ." Section 2077 sets forth rules for construing conveyances in situations where the construction is doubt-

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[10]As originally enacted, the section did not contain the introductory clause. It read, "When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream." The statute was amended in 1874 to its present form. (Stats. 1873-1874, Amend. to the Codes, ch. 612, p. 220.) The People rely upon this change as indicating that the section was intended to set forth only a rule of construction.

ful. It provides that a deed to land bordering a navigable nontidal lake is to be construed as conveying the right of the grantor to low water mark.

The People urge that section 670 is a rule of property, and sections 830 and 2077 are rules of construction. They point out that section 830 contains no words of conveyance, such as "grant" or "quitclaim," and argue that to construe the section as a grant of thousands of linear miles of lands owned by the public would violate the rule that grants by the public to a private party are to be construed in favor of the public. (§ 1069; *People v. Centr-O-Mart* (1950) 34 Cal.2d 702, 703 [214 P.2d 378]; *Oakland v. Oakland Water Front Co.* (1897) 118 Cal. 160, 174-175 [50 P. 277].) Lyon claims, on the other hand, that section 830 constitutes a rule of property, and that by enactment of the section, the state granted to riparian owners the lands to low water.

The parties cite numerous cases in support of their respective positions as to the interpretation of the section. We have examined these cases, and we find that while they contain dicta, suggestions, and implications from which one side or the other may take comfort, none contains a direct holding on the question whether section 830 was intended to constitute a grant of property between high and low water in navigable lakes and rivers.

Lyon relies upon *Packer v. Bird* (1886) 71 Cal. 134 [11 P. 873]. In that case, the plaintiff claimed ownership of an island in a navigable portion of the Sacramento River, asserting that his patent extended to the thread of the stream, which included the island. The court held that his

title went only to the "edge of the stream" and did not include the island. The quoted words are obviously ambiguous, but Lyon, in support of the argument that the "edge of the stream" means low water, relies upon the briefs of the parties in the case, which discussed the import of sections 830 and 670. Reference in a brief to these statutes is insufficient to clarify the ambiguous language employed by the court.[11]

The case most favorable to the position of Lyon is the *City of Los Angeles v. Aitken* (1935) 10 Cal.App.2d 460 [52 P.2d 585]. There the court declared that the title of private landholders in a navigable nontidal lake extended to low water mark, citing section 830, and that the state was the owner below low water, citing section 670. However, the statement was dictum, since the only issue in the case was whether Los Angeles, which sought to condemn fee simple title to the littoral rights of landowners to maintain the natural level of the lake, could avoid payment of substantial damages because of the poor quality of the water for domestic use.[12]

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[11]*Packer* was affirmed by the United States Supreme Court, which also employed ambiguous language in its decision. (*Packer v. Bird* (1891) 137 U.S. 661, 672 [34 L.Ed. 819, 822, 11 S.Ct. 210].) Later decisions of the high court cited *Packer* for the proposition that the jurisdiction of California in nontidal navigable waters extends to high water. (*Hardin v. Jordan, supra,* 140 U.S. 371, 382-383 [35 L.Ed. 428, 433-434]; *Shively v. Bowlby, supra,* 152 U.S. 1, 44-45 [38 L.Ed. 331, 347-348].)

[12]Other cases relied upon by Lyon either make no reference to section 830 (*Maginnis v. Hurlbutt* (1920) 49 Cal.App. 460 [193 P. 606]; *Crews v. Johnson* (1962) 202 Cal.App.2d 256, 258 [21 Cal. Rptr. 37] [in a dispute between adjoining littoral owners at Clear Lake, the court stated that the parties conceded that private owner-

The People rely primarily on *Churchill Company v. Kingsbury* (1918) 178 Cal. 554 [174 P. 329]. In that case, the petitioner sought to compel the surveyor-general to perform acts preliminary to issuance of a patent for the lands between high and low water in Little Klamath Lake, which the court found to be navigable. The petitioner relied upon the terms of an 1893 statute in support of his claim. It was held that the statute did not authorize the issuance of the patent. In the course of its opinion, the court noted that the petitioner took the position that "the land is, in fact sovereign land of the state, and in this, we think it is clearly right." (178 Cal. at p. 558.) The statement was dictum, the court did not cite section 830, and Lyon points out that the briefs of the parties in the case did not bring the section to the attention of the court. (See also *People v. Morrill* (1864) 26 Cal. 336, 356.)

If the decisional law is ambiguous regarding whether section 830 constitutes a grant or a rule for the construction of deeds, the same cannot be said of the administrative interpretation of the provision. Lyon has produced a voluminous body of evidence demonstrating that, with few

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sh ɔ of the submerged lands extended to low water]) or refer to the section but do not discuss its meaning (*Craig v. White* (1921) 187 Cal. 489, 492 [202 P. 648] [the court cited § 830 for the proposition that patents issued by the federal government conveyed title to the patentees to "the actual margin of the lake"]; *Foss v. Johnstone* (1910) 158 Cal. 119, 130 [110 P. 294] [citing § 830 as setting forth "certain incidents attaching to lands bordering upon waters" in a case involving a nonnavigable pond].) In *United States v. Gossett* (9th Cir. 1969) 416 F.2d 565, 568-569, the court classified California as a low water jurisdiction, apparently based largely upon the disclaimer by California's Attorney General to ownership of the state above that line.

exceptions, state authorities, including the Attorney General, took the position until at least 1970 that by virtue of the provisions of section 830 the state claimed ownership only to the low water mark. (See 43 Ops.Cal.Atty.Gen. 291, 295 (1964); 30 Ops.Cal.Atty.Gen. 262, 269 (1957); 23 Ops. Cal.Atty.Gen. 306, 307 (1954); 23 Ops.Cal.Atty.Gen. 97, 98 (1954).) In 1970, the Attorney General reexamined this position, and reversed his opinion, and in the trial of a condemnation action involving the Feather River (People v. Shasta Pipe and Supply Co. (Sup. Ct. Butte Co., No. 37390), and in other actions thereafter, asserted that the state owned the land under navigable lakes and streams to high water. In 1977, the Attorney General advised the State Lands Commission of this position.

According to affidavits, the files of the State Lands Commission contain hundreds of letters stating or implying that the state's ownership extends waterward of the ordinary low water mark.

Finally, the Legislature has impliedly accepted the low water mark of Clear Lake as the boundary of the state's ownership. The state has conveyed to Lake County its title to Clear Lake, in trust. The language of the grant assumes that the state's interest is to low water mark. (Stats. 1973, ch. 639, § 1, p. 1165.)[13]

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[13]Section 1 of the statute, after granting to the county, in trust, the state's interest in Clear Lake, provides, "The low water mark for Clear Lake has not been determined, and such determination may have to be made by judicial adjudication. Subject to such later determination and for the purpose of the administration of this grant only, the low water mark shall be considered by the parties to this grant as being zero on the Rumsey Gauge." The Rumsey

We are aware of the rule that the administrative construction of a statute is not necessarily determinative (*Whitcomb Hotel, Inc. v. Cal. Emp. Com.* (1944) 24 Cal.2d 753, 756-757 [151 P.2d 233, 155 A.L.R. 405]), but we cannot ignore these long-continued and frequently expressed views to the effect that section 830 constitutes a grant to private persons of title to the beds of navigable, nontidal bodies to low water mark. It cannot be said that the statute is so clear and unambiguous that these expressions may be disregarded. In this connection, we note that two states which adopted a statute similar to section 830 as part of the Field Code, interpret their enactments as conveying title to riparian owners to the low water mark in navigable, nontidal waters. (Mont. Rev. Codes 1947, § 67-712; *Herrin v. Sutherland* (1925) 74 Mont. 587 [241 P. 328, 331, 42 A.L.R. 937]; N.D. Cent. Code, § 47-01-15; *Hoque v. Bourgois* (N.D. 1955) 71 N.W.2d 47, 52 [54 A.L.R.2d 633].)[14]

We conclude, therefore, that Lyon has title to the low water mark of Clear Lake.

Gauge refers to a method by which Captain George Rumsey established the level of Clear Lake. The intersection of zero on that gauge with an elevation of 1,318.65 feet may represent the low water mark of the lake.

[14]There is no merit in the argument of the People that because section 830 has been employed to construe deeds in disputes involving nonnavigable waters (*Hess v. Merrell* (1947) 78 Cal.App. 2d 896, 899-900 [178 P.2d 467]) and tide waters (*Lynch v. Kupfer* (1933) 134 Cal.App. 652, 656 [26 P.2d 33]), the provision cannot be viewed as a rule of property in nontidal cases. We find nothing inconsistent in the notion that the provision may state a rule of property and may also constitute a rule for the construction of deeds.

We come, then, to the question whether the grant of lands between high and low water made by section 830 to riparian landholders is free of the trust described in *City of Berkeley*. It is well settled that if the state holds these lands in trust for the benefit of the public, its conveyance of title to private persons does not necessarily free the property from the burden of the public trust. Instead, unless the conveyance is made for the purpose of promoting trust goals, the grantee takes title subject to the rights of the public. This was the holding in *City of Berkeley* and in *People v. California Fish Co.* (1913) 166 Cal. 576, 596 [138 P. 79].

In *City of Berkeley*, we were concerned with whether 22,299 acres of tidelands in San Francisco Bay, granted to private persons by deeds purportedly in fee, between 1868 and 1870, were subject to the tidelands trust. We answered this question in the affirmative. We observed that under the venerable doctrine of the tidelands trust, which had its origin in Roman law, tidelands are owned by the state in trust for the public, for their use for commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state. Grants of such lands to private persons are subject to the trust unless the conveyances are made to enhance trust purposes. We determined that the grants in question were not made for such purposes, and that in any event, the state was not empowered to make such vast grants to private parties in its role as trustee.

The holding of *California Fish* is similar. There it was decided that, although various statutes authorizing the alienation of tidelands into private ownership effectively

passed title, the grantees took subject to the rights of the public because the grants in question were not made for the purpose of promoting the aims of the trust.

Lyon and amicus California Land Title Association urge that there is not and never has been a doctrine that nontidal, navigable waters are subject to a public trust. Rather, they claim, such waters are impressed only with a "recreational or navigational easement" which allows the public to use only the waters, so that when they rise above low water mark, the public may use them for navigation or fishing, but the bed between low and high water belongs to the riparian owner and when the water recedes the public has no right to use of the land above the low water mark.

The People and supporting amici curiae rely upon article X, section 4 of the Constitution,[15] which provides for freedom of access to and the right of navigation upon waters that are navigable. They rely also upon numerous cases which declare that California owns the lands under navigable waters in trust, without distinguishing between tidal and nontidal bodies in this regard. (See, e.g., *Colberg, Inc. v. State of California* (1967) 67 Cal.2d 408, 416 [62 Cal.Rptr. 401, 432 P.2d 3]; *Boone v. Kingsbury* (1928) 206

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[15]This provision was adopted in 1879 as article XV, section 2. It states: "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

Cal. 148, 189 [273 P. 797]; *People v. Gold Run D. & M. Co.* (1884) 66 Cal. 138, 151 [4 P. 1152].)

In our view, *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110], which we described in *City of Berkeley* as the "seminal case on the scope of the public trust doctrine" (26 Cal.3d at p. 521), settled the issue. It held very clearly that the applicability of the public trust doctrine does not turn upon whether a body of water is subject to the ebb and flow of the tide, but upon whether it is navigable in fact.

Illinois Central involved a grant by the State of Illinois of 1,000 acres of the bed of Lake Michigan constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The high court held that the grant was revocable, that the state held these lands in trust for the public, and that it was powerless to relinquish its rights as trustee. The opinion addressed itself specifically to whether the trust doctrine was inapplicable because there was no appreciable tide in Lake Michigan. It rejected this premise in the following unmistakable language: ". . . by the common law, the doctrine of the dominion over and ownership by the crown of lands . . . under tidewaters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters . . . being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over

the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, therefore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." (146 U.S. at pp. 436-437 [36 L.Ed. at pp. 1036-1037].)

Lyon and amicus California Land Title Association insist that the holding of *Illinois Central* is confined to the Great Lakes, which are "special because of their size and importance in interstate commerce." While it is true that the opinion emphasizes the importance of the Great Lakes for commerce, the portion of the opinion quoted above makes it clear that it is navigability which is the touchstone in determining whether or not the public trust applies. The application of the trust doctrine to tidal waters is not confined to those bodies which are huge in size and important for purposes of commerce; we can see no reason why such a test should not be applied to nontidal waters. Nor does *Illinois Central* set forth a special rule relating to Lake Michigan. Other jurisdictions have recognized that the doctrine enunciated in that case applies to nontidal bodies which cannot be characterized as "inland

seas." (E.g., *State v. Southern Sand & Material Co.* (1914) 113 Ark. 149 [167 S.W. 854, 856]; *State v. Korrer* (1914) 127 Minn. 60 [148 N.W. 617, 623]; *Flisrand v. Madson* (1915) 35 S.D. 457 [152 N.W. 796, 801]; *Hazen v. Perkins* (1918) 92 Vt. 414 [105 A. 249, 251 23 A.L.R. 748]; *State v. Public Service Commission* (1957) 275 Wis. 112 [81 N.W.2d 71, 73-74.)[16] It is noteworthy that South Dakota, like California, has adopted a provision similar to section 830 but, as *Flisrand* makes clear, the state has impressed a trust for public uses on the riparian owner's property between high and low water.

Another matter of interest in this connection is that an opinion of the California Attorney General relied upon by Lyon for the proposition that section 830 has been interpreted by state officials as setting a low water boundary for public ownership explicitly qualified this opinion by the statement that the riparian owner's title between low and high water is held in trust to preserve the rights of commerce and navigation for the public. (43 Ops.Cal. Atty.Gen., *supra*, 291, 294.)[17]

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[16]In support of this assertion, Lyon states that other navigable waters in Illinois, such as the Mississippi River, are owned by private parties. (Citing *City of St. Louis v. Rutz* (1891) 138 U.S. 226, 242 [34 L.Ed. 941, 947-948, 11 S.Ct. 337]; *Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296, 299].) In *Appleby v. City of New York* (1926) 271 U.S. 364, 395 [70 L.Ed. 992, 1004, 46 S.Ct. 569], it was said that although *Illinois Central* was "necessarily a statement of Illinois law," the general principle declared therein has been recognized throughout the country.

[17]The opinion states, "[U]pon its admission to the Union, California acquired title to all land below the high water mark of all navigable water within its territory, whether or not such water was tidal. This title is held in trust for the people of the State, in order

Our conclusion that the public trust is applicable to nontidal waters is also pertinent to the consideration of Lyon's argument, apparently accepted by the trial court, that as to the area between high and low water the public has an interest only in the water itself, so that it may use the water for boating and fishing, but when a lake or stream is at low water, the public has no right to use the bed to the high water mark. In *Marks v. Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374], we held that, although early cases had expressed the scope of the public's right in tidelands as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state.

We see no justification in reason or authority for the proposition advanced by Lyon. In *People* ex rel. *Baker v. Mack* (1971) 19 Cal.App.3d 1040 [97 Cal.Rptr. 448], relied upon by Lyon as holding that the public interest in nontidal waters is confined to the waters themselves, the primary issue was the navigability of a section of the Fall River, which defendants had obstructed by erection of booms, fences and bridges, preventing plaintiff from boating, hunting and fishing in the stream. The court adopted a broad definition of navigability, holding that any waters which could be used for recreation were navigable and

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to preserve the right of commerce and navigation for the public. . . .

"There is no requirement that the state claim all land below high water mark. As long as the rights of the public are not impaired, the state may permit private ownership of land beneath non-tidal, navigable waters."

could be used by the public. In the course of its opinion, the court made the following statement, upon which Lyon relies: "[M]embers of the public have the right to navigate and to exercise the incidents of navigation in a lawful manner at any point below high water mark on waters of this state which are capable of being navigated by oar or motor-propelled small craft." (19 Cal.App.3d at p. 1050.)

We fail to see how Lyon can find comfort in this statement. It does not mean that the public's rights are confined to the waters as such, but merely attempts to distinguish between waters capable of commercial use—which were there claimed to be the test of navigability—and those capable of recreational use. Other cases cited by Lyon also fail to support his position.[18]

Nevertheless, argues Lyon, there is a sound reason in logic why tidal and nontidal waters should be treated

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[18]*Hitchings v. Del Rio Woods Recreation & Park Dist.* (1976) 55 Cal.App.3d 560 [127 Cal.Rptr. 830], was an action for declaratory relief to determine whether a certain portion of the Russian River was navigable. The court adopted the broad recreational use test of navigability set forth in *People* ex rel. *Baker v. Mack, supra*, 19 Cal.App.3d 1040, 1050, and held that the river was deemed in law to be navigable even though it was not in fact navigable for some part of the year.

In *Bohn v. Albertson* (1951) 107 Cal.App.2d 738 [238 P.2d 128], a tract of land was flooded when a levee broke. The flooding converted the land into a navigable body of water, upon which pleasure boats sailed and the public fished. It was held that the landowner could not charge the public for use of the water because while it was subject to recreational use it was a navigable body. However, the court held that the landowner had the right to reclaim the land since he had not lost title when it was suddenly flooded by the break in the levee, in accordance with the established rule governing avulsion.

differently insofar as these public's rights are concerned. He asserts that because tidelands are subject to inundation on a daily basis and nontidal waters are inundated only seasonally, tidelands are constantly subject to use for commerce, navigation and fishing, while the strip of land between low and high water in a nontidal body is only useful for such purposes for a limited portion of the year. Therefore, he concludes, the necessity for impressing nontidal waters with the public trust is greatly reduced.

But this contention is predicated on an exceedingly narrow view of the purposes of the public trust. As Justice McComb pointed out for a unanimous court in *Marks v. Whitney, supra,* 6 Cal.3d 251, 259, the public's rights in tidelands are not confined to commerce, navigation and fishing, but include recreational uses and the right to preserve the tidelands in their natural state. We discern no valid reason why the scope of the public's right in nontidal waters should not be equally broad. Lyon's assertions in this regard imply the resurrection of the common law distinction between tidal and nontidal waters —a distinction which has been thoroughly discredited in this country. As was said in *Illinois Central,* when the United States rejected the English rule that admiralty jurisdiction was confined to tidewaters because it was inapplicable to the conditions in this country, "the limitation and all its incidents were discarded." (146 U.S. 387 at p. 436 [36 L.Ed. 1018 at p. 1036].) We hold that the same incidents of the trust applicable to tidelands also apply to nontidal navigable waters and that the public's interest is not confined to the water, but extends also to the bed of the water.

In *California Fish* it was held that a statute authorizing the conveyance of tidelands will not be interpreted to abandon the public trust unless no other interpretation is reasonably possible. Nothing in the language of section 830 requires a conclusion that riparian landholders take free of the public's rights in the lands between low and high water in navigable lakes and streams. We conclude, therefore, that Lyon's title to such lands is impressed with the public trust.

Lyon's final argument is that his ownership of the Anderson Marsh to low water free of the public trust is a "rule of property" and that a determination applying a trust to such property would accomplish a taking of private property in violation of federal and state constitutional provisions. He relies upon cases which recognize the protection of property rights afforded by the federal and state Constitutions. (*Board of Regents v. Roth* (1972) 408 U.S. 564, 577 [33 L.Ed.2d 548, 561, 92 S.Ct. 2701]; *Agins v. City of Tiburon* (1979) 24 Cal.3d 266, 273-274 [157 Cal. Rptr. 372, 598 P.2d 25]; *House v. L.A. County Flood Control Dist.* (1944) 25 Cal.2d 384, 391 [153 P.2d 950].) (4) (See fn. 19.) We doubt whether any failure of the state to previously assert its trust rights in the lands below high water (but see 43 Ops. Cal. Atty. Gen., *supra*, 291, 294) constitutes a "rule of property."[19]

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[19]In *Abbott v. City of Los Angeles* (1958) 50 Cal.2d 438, 456 [326 P.2d 484], a "rule of property" was defined as "A settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property. . . . The principle appears to be an extension of the '*stare decisis*' rule, which . . . seems to apply with peculiar force and strictness to decisions which

Indeed, in some respects, our holding constitutes less of an interference with property rights than occurred in *Illinois Central, California Fish*, and *City of Berkeley*. In those cases, the landowners had received outright grants from the state, purportedly in fee, while the title of Lyon to the lands in issue here is based only upon administrative interpretation of an ambiguous statute. In *Illinois Central* the high court held that the grant of the lands in question was revocable—not merely that the railroad held the property subject to the trust—on the ground that "[t]here can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it." (146 U.S. 387, at p. 460 [36 L.Ed. 1018, at p. 1045].) And, in *California Fish*, in response to an argument by the grantees that the public should be estopped to claim any interest in the tidelands it had sold into private ownership, the court declared that the grantees had received title to the soil (subject to the public trust), and that they had "received consideration for their money, and it is to be presumed that they bought

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have determined questions respecting real property and vested rights. . . ."

Lyon's reliance on the "rule of property" which he espouses is open to question. The agreement under which he purchased Anderson Marsh provides that the seller does not warrant ownership of lands below zero mark on the Rumsey Gauge, and it makes provision to set aside some of the purchase monies in trust in the event a governmental body claims property above that point. Moreover, title insurance policies relating to the property except from coverage claims of the state to any portion of the property lying within the bed of the lake, any rights of the public for commerce, navigation or fishing, and any adverse claim to lands created by artificial means.

with knowledge of the law on the subject." (5) (See fn. 20.) In at least two jurisdictions in which the matter has been considered, the fact that the land between high and low water is owned by private parties is held not to prevent the imposition of the public trust to the high water mark. (*State v. Korrer, supra,* 148 N.W. 617, 623; *Flisrand v. Madson, supra,* 152 N.W. 796, 801.)[20]

We emphasize that Lyon is not deprived of the use of the lands between low and high water, and that he may utilize them in any manner not incompatible with the public's interest in the property.[21]

Let a writ of mandate issue directing the trial court to vacate its order granting Lyon partial summary judgment, and to grant the People's motion for partial summary judgment insofar as consistent with the views expressed above.

Bird, C. J., Tobriner, J., and Newman, J., concurred.

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[20]The People raise an additional question regarding the correctness of the trial court's ruling. The court determined that the appropriate boundary between public and private ownership is to be measured in accordance with the "last natural" ordinary low water mark of the lake, i.e., the water level in existence prior to the construction of a dam in 1914. The People argue that the proper standard of measure is the lake in its current condition. This issue is also presented in *State of California v. Superior Court (Fogerty)* (1981) *post,* at page 240 [—Cal.Rptr.—, —P.2d—], and it is discussed in the opinion in that case. We conclude that the position of the People is correct, and that the determination of the boundary between public and private ownership must be assessed in accordance with the shoreline of the lake as it exists presently.

[21]Lyon has moved to strike the People's "Replication to Answer to Petition for Writ of Mandamus" and an appendix to that brief. The People filed a motion to strike certain portions of the brief of amicus curiae California Land Title Association. These motions are denied.

CLARK, J., Concurring and Dissenting.—The majority opinion overwhelmingly establishes that by statute, case authority and practice California historically has not claimed title to land between the high and low water marks of inland bodies of water. I thus concur in the majority holding that Lyon has fee title to lands above the low water mark of Clear Lake.

However, I must dissent from the holding that lands lying along navigable streams and lakes between high and low water levels are subject to the tidelands and submerged lands trust. That trust should be limited to tidelands as its name implies—lands covered and uncovered by the flow and ebb of the tide—and submerged lands. Historically, the trust has not been applied to land between high and low water mark on navigable lakes and streams (the shorezone). To the contrary, millions of acres have been reclaimed between high and low water for residential, agricultural, and general governmental uses—uses which would have been and are improper if the trust doctrine is applicable. History establishes it would have been against public policy—greatly impeding the development of the resources of our state—to have applied the trust doctrine. To apply that doctrine for the first time today casts clouds on thousands if not millions of land titles and uses, and jeopardizes agricultural and residential uses of millions of acres which are presently so used and are far more valuable for farm and home than for trust uses. While public recreational and ecological uses of the shorezone are important considerations, the state has and is providing for such uses. Application of the trust to millions of acres historically and

presently within the shorezone is overkill, contrary to public policy, and an inequitable infringement on long-settled and vested titles.

I. The Trust

The common law trust at issue has repeatedly been described by our courts as applying to tide and submerged lands. (E.g., *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 518-519, fn. 1 [162 Cal.Rptr. 327, 606 P.2d 362]; *Marks v. Whitney* (1971) 6 Cal.3d 251, 257, fn. 1 [98 Cal. Rptr. 790, 491 P.2d 374]; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482 [91 Cal.Rptr. 23, 476 P.2d 423]; *San Diego County Archaeological Society Inc. v. Compadres* (1978) 81 Cal.App.3d 923, 925 [146 Cal.Rptr. 786].) The Clear Lake lands now at issue are not tidelands—they are not daily covered and uncovered by the flow and ebb of tide water. (See *Marks v. Whitney, supra*, 6 Cal.3d 251, 258; *People v. Kerber* (1908) 152 Cal. 731, 733 [93 P. 878].) Unlike tidelands the instant shorezone is uncovered for long periods of time—often the better part of a year. Tidelands unlike the instant lands are covered and uncovered twice each day by salt water, which—unlike the waters of Clear Lake—severely limits use of underlying lands for agricultural purposes. The instant shorezone land is obviously not submerged land.

Before considering historical matters requiring rejection of the majority's extension of the trust to shorezones, we should first consider the trust as it applies to true tide and submerged lands.

Tidelands and submerged lands owned by the state are held in trust for public purposes of navigation, commerce and fisheries. (*City of Long Beach v. Mansell, supra*, 3 Cal. 3d 462, 482; *People v. California Fish Co.* (1913) 166 Cal. 576, 584 [138 P. 79].) Tidelands subject to the trust may not be alienated into absolute private ownership: an attempted conveyance of such land transfers "only bare legal title," and the property remains subject to the public trust easement. (*Id.*) The decisions of this court have established that the trust is a limitation on governmental as well as private reclamation activities. (*City of Long Beach, supra*, 3 Cal.3d 462, 482-486; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 38 [48 P.2d 20]; *City of Oakland v. Williams* (1929) 206 Cal. 315, 327-328, 330-331 [274 P. 328].)

The uses permitted within the trust are described in *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260 [98 Cal.Rptr. 790, 491 P.2d 374], as follows: "Public trust easements are traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes. [Citations.] The public has the same rights in and to tidelands. [¶] The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another. [Citations.] There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their

natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorable affect the scenery and climate of the area. It is not necessary to here define precisely all the public uses which encumber tidelands."

Permissible uses of tidelands whether by government or private citizens are numerous within the broad terms of the public trust for navigation, commerce, fishing and other purposes. For example, in *City of Oakland v. Williams* (1929) 206 Cal. 315, 319-323 [274 P. 328], this court upheld the use of such lands by a private party for a warehouse to be used for shipping, processing, and packing dried fruits. (See *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40 [48 P.2d 20].)

Nevertheless, there are certain common land uses which are not included within trust uses, namely, residential, agricultural, and general governmental. Individuals as well as government may enforce the trust. (*Marks v. Whitney, supra*, 6 Cal.2d 251, 261-262.)

Reclamation of tidelands does not in and of itself terminate the public trust. (*Marks v. Whitney, supra*, 6 Cal. 3d 251, 261; *City of Long Beach v. Mansell, supra*, 3 Cal. 3d 462, 483; *Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 402 [60 P.2d 825]; *Atwood v. Hammond* (1935) 4 Cal.2d 31, 40-41 [48 P.2d 20].) However, if the Legislature finds and determines that particular lands are no longer useful for trust purposes, it may free them from the trust. (*Marks v. Whitney, supra*, 6 Cal.3d 251, 260; *City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 482.)

Statutes purporting to terminate the public use will be carefully scanned to determine whether that was the legislative intent. (*City of Berkeley v. Superior Court, supra*, 26 Cal.3d 515, 525.)

II. The Shorezone Historically

We were taught in elementary schools that geographical conditions encountered by early settlers of our great California valleys were significantly different from those presently existing. Winter and spring rains and snows melting in the Sierras created great inland seas in the center of California. The width of rivers measured by feet in summer extended to miles during parts of the spring.[1] While the land regularly covered by water was as rich as any in the world, it could only be effectively farmed after the water receded. The flooding and short growing season limited production of crops and improvements which could be made.

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[1]Historically, the Sacramento River has carried off the annual spring flow of seasonal rains and melting snows which arise in surrounding mountains. Large basins were formed as vast amounts of water regularly overflowed river banks. During spring seasons, the total basin covered 1,250 square miles and in extraordinary years 1,700 square miles. When spring flood waters evaporated, the most fertile and productive agricultural land was exposed. (See, Rep. of A Board of Engineers Upon Examination of Sacramento, San Joaquin, and Feather Rivers, Cal., H.R. Doc. No. 262, 59th Cong., 1st Sess., p. 6 (1905); Rolle, California: A History (1969) pp. 370-371.) Similarly, the Fresno River (*Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 63-64 [99 P. 502], and the San Joaquin River (*Herminghaus v. So. California Edison Co.* (1926) 200 Cal. 81, 87-88 [252 P. 607]) have traditionally overflowed during the spring time to produce large marshland areas, which were subsequently highly productive.

Much of the history of California is tied to reclamation and farming of the state's rich bottom land. Such reclaimed lands have become some of the world's most productive farmland. Other large areas of reclaimed land have been used for urban development. For example, much of Sacramento is built upon reclaimed land. (E.g., *Gray v. Reclamation District No. 1500* (1917) 174 Cal. 622. 626-631 [163 P. 1024] (Sacramento and Feather Rivers); *Miller & Lux v. Madera Canal etc. Co.* (1909) 155 Cal. 59, 67 et seq. [99 P. 502] (San Joaquin River); *Modoc L. & L. S. Co. v. Booth* (1894) 102 Cal. 151, 153 et seq. [36 P. 431] (Pitt River).)

In addition to tracts now protected from flood waters there remain large tracts that—while flooded in winter and spring—are naturally drained and farmed in the summer and fall. For example, the Yolo Basin, which is used during the annual runoff to reduce flood pressure on other areas (see, *Gray v. Reclamation District No. 1500, supra*, 174 Cal. 622, 631), is an area of many square miles and is put to productive farm use when the waters recede.

Similarly, not all homes built within the shorezones are free from regular flooding. Thousands of such homes remain, for example, along the Russian River. These shorezone homes are regularly flooded.

The acres of reclaimed land which have been put to productive agricultural and residential use numbers in the millions. So far as I am aware, the Legislature has never found or determined such reclaimed lands useless for trust purposes or free of the trust. Indeed, it is by no means clear the Legislature could have found or could

now find such reclaimed lands or even the greater portion thereof useless for trust purposes when we remember that among such purposes are recreational and ecological uses. While the lands may be extremely valuable for agricultural and residential purposes, a balancing of values is not the test under the trust doctrine. The test is lack of value for trust purposes. In addition, it must be pointed out that the government exacted a ransom of $783.500 to clear the title of the homeowners in the subdivision in the asserted tidelands area involved in *City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 475.

The history of development of our great agricultural valleys and related residential development is directly in conflict with the asserted common law trust the majority seek to impose.

The majority trust doctrine is not merely in conflict with the private assertion of fee interest to reclaimed lands, but it is abundantly clear the state has encouraged and provided for such uses. One need only examine the three volumes of West Publishing Company's Appendix to our Water Code to note the collection of statutes enacted by our Legislature to establish reclamation districts which were obviously designed to further private agricultural use of reclaimed lands. While such districts may have also furthered navigational purposes on the concerned bodies of waters, it would be unreasonable to conclude that assessments against reclaimed lands to finance the costs of reclamation did not reflect increased values of properties as agricultural lands or that reclamation districts were not created with the intent the lands were to be used for agri-

cultural purposes. Further, numerous municipalities in historical shorezone areas have approved subdivisions for residential development and have provided residential services, all of which activities are in conflict with the majority's trust.

In concluding that in the past 130 years there has been a public policy to maintain land in its natural state or to limit historical shorezones to trust uses, the majority blind themselves to the historical development of controlling law. This law recognizes what highly productive members of our society undertook to forge, not only to serve their needs but also to serve the needs of society with the authorization, approval and encouragement over the years of our Legislatures, Governors, and local governmental agencies.

Application of the trust doctrine to the shorezone is contrary to California public policy. Rather than precluding farming and residential use of the shorezone, the policy has been to encourage reclamation and farming and residential use of these properties.

Protection of parts of our historic shorezone for the purposes permitted by the trust is a worthy endeavor but it should not be accomplished with a blunderbuss that confiscates thousands—perhaps millions—of titles, and jeopardizes existing use of millions of acres of residential and farm lands. While, as the majority recognize (*State of California v. Superior Court (Fogarty)*, *post*, p. 240 [— Cal.Rptr. —, — P.2d —]), the state must compensate the landowner for improvements should it choose to exercise the trust and take property for park or other purpose.

it is not required to compensate for taking the land. From time immemorial landowners within the shorezone have conducted themselves in good faith as if they were owners in fee, and the land (apart from improvements) has been assessed and taxed as in the case of all fees not subject to the state's assertion of a right to take under a trust. To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible.

In concluding that the trust doctrine must extend to the shorezone the majority rely mainly upon *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110] where the Supreme Court held that a grant of *submerged* lands in Lake Michigan was subject to the trust. (*Id.*, at p. 452 et seq. [36 L.Ed. at p. 1042 et seq.].) The court expressly recognized that it did not impose a trust on the shorezone. It stated: "If it be ascertained . . . and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown . . ." (*Id.*, at p. 450 [36 L.Ed. at p. 1041].) The court's order was to the same effect. (*Id.*, at p. 464 [36 L.Ed. at pp. 1046-1047].)

Far from serving as authority to extend the trust to freshwater shorezones, *Illinois Central Railway* reflects it is *only* navigable submerged lands that are subject to the trust.

I would deny mandate.

Richardson, J., concurred.

Appendix E

Order Denying Review

After Judgment by the Court of Appeal

3rd District, Civil No. 25115

In the Supreme Court
of the State of California

In Bank

Fogerty et al.

v.

State of California et al.

Appellants' petitions for review DENIED.

LUCAS
Chief Justice

[Filed March 4, 1987]

Appendix F

In the
Court of Appeal of the State of California
in and for the
Third Appellate District

3 Civil C000163
Placer 48281

Charles F. Fogerty, Etc., et. al.
Plaintiff and Appellant

vs.

State of California, et. al.
Defendant and Respondent

REMITTITUR TO COUNTY CLERK

I, Wilfried J. Kramer, Clerk of the Court of Appeal of the State of California for the Third Appellate District, do hereby certify that the attached is a true and correct copy of the original opinion entered in the above entitled cause that has now become final.

Respondents to recover costs.

WITNESS my hand and the seal of the Court affixed at my office this 11th day of March 1987.

WILFRIED J. KRAMER, Clerk
By: Liston, Deputy

Appendix G

Superior Court of the State of California
for the County of Placer

Case No. 48281

Charles F. Fogerty, Stella Fogerty, Russell S. Grove,
Nancy J. Grove, et. al.,
Plaintiffs,

vs.

State of California; State Lands Commission
of the State of California, et al.,
Defendants.

As modified by the Third District Appellate Court, "the high water mark of Lake Tahoe constituting the uppermost limit of that lake subject to public trust is located at 6228.75 feet above sea level, Lake Tahoe datum". The judgment was otherwise affirmed.

DATED: May 6, 1987

GEORGE YONEHIRO
Judge of the Superior Court

Appendix H

Appellate Court Decision (Fogerty)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

SEE CONCURRING OPINION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
IN AND FOR
THE THIRD APPELLATE DISTRICT
(Placer)

3 Civil 17381
(Super. Ct. No. 48281)

CHARLES F. FOGERTY, et al., Plaintiffs and Respondents,

v.

STATE OF CALIFORNIA, et al., Defendants and Appellants.

[Filed Mar. 28, 1979]

Defendants appeal from a preliminary injunction order. As will appear, without addressing the merits, we shall conclude that the trial court did not abuse its discretion in issuing the preliminary injunction.

The events leading to the injunction are as follows: by letter dated March 8, 1977, the Attorney General advised the State Lands Commission ("Commission") of the State's claim of sovereign ownership—to ordinary high-water mark—of the beds of non-tidal navigable lakes and streams throughout California. Pursuant to this advice, the State Lands Commission announced its intention to record notices of such claim in the counties where

navigable lakes and streams are located. Plaintiffs, alleging ownership interests in Lake Tahoe waterfront property, sought to restrain the Commission from recording such notices unless the notices consisted of a lis pendens filed in conjunction with a legal proceeding. As requested, the trial court issued a preliminary injunction prohibiting the Commission from recording such notices.

Defendants have the right to appeal from an order granting a preliminary injunction. (Code Civ. Proc., § 904.1, subd. (f).) However, the scope of inquiry on appeal is limited so that the reviewing court will not interfere with the trial court's order in the absence of a showing of clear abuse of discretion. (Weingand v. Atlantic Sav. & Loan Assn. (1970) 1 Cal. 3d 806; Continental Baking Co. v. Katz (1968) 68 Cal.2d 512; Porter v. Jennings (1891) 89 Cal. 440.) Nevertheless, the parties' briefs exhaustively argue the heart of the underlying dispute.

The substantive issue is whether the land between the ordinary high and low water marks along the shorelines of navigable lakes and streams is in State or private ownership. The State urges us to resolve this issue on this appeal from the preliminary injunction order. The trial court's issuance of a preliminary injunction order, however, neither attempts to adjudicate nor has the effect of adjudicating the merits of the ultimate controversy. (Patterson v. Board of Supervisors (1875) 50 Cal. 344; Socialist Workers etc. Committee v. Brown (1975) 53 Cal.App.3d 879.) Rather, it simply preserves the status quo pending trial (Continental Baking Co. v. Katz, supra, 68 Cal.2d at p. 534; People v. Black's Food Store (1940) 16 Cal.2d 59; West Coast Constr. Co. v. Oceano Sanitary Dist. (1971) 17 Cal.App.3d 693), so that final resolution on

the merits may not become ineffectual. (Froomer v. Drollinger (1960) 183 Cal.App.2d 787.) Here, then, the trial court's granting of the preliminary order succeeded in restraining the Commission's recording of notice without proceeding further to comment one way or another on the strength of opposing claims to the lakeshore property. (See Bomberger v. McKelvey (1950) 35 Cal.2d 607; Miller & Lux v. Madera Canal etc. Co. (1909) 155 Cal. 59.) Consequently, at this stage of the litigation, we as an appellate court do not determine the rightful owner of the lakeshore property, but properly confine ourselves to a review of the propriety of the trial court's issuance of the preliminary injunction against the Commission. (Continental Baking Co. v. Katz, supra, at p. 512; Patterson v. Board of Supervisors, supra, 50 Cal. 344; State Bd. of Barber Examiners v. Star (1970) 8 Cal.App.3d 736; French Art Cleaners v. St. Bd. etc. Cleaners (1949) 91 Cal.App.2d 890.)

The Supreme Court, in Continental Baking Co. v. Katz, supra, at page 528, has described the mechanics by which a trial court, in balancing the respective equities of the parties, decides whether to grant or deny a request for a preliminary injunction: ". . . the court examines all of the material before it in order to consider 'whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; . . .' [Citations.] In making that determination the court will consider the probability of the plaintiff's ultimately prevailing in the case, and it has been said, will deny a preliminary injunction unless there is a reasonable probability that the plaintiff will be successful in the assertion of his rights. [Citations.] As was said in *Family Record Plan, Inc. v. Mitchell* (1959) 172 Cal.App.2d 235, 242 [342

P.2d 10], 'In the last analysis the trial court must determine which party is more likely to be injured by the exercise of its discretion [citation] and it must then be exercised in favor of that party [citation].' "

The preliminary injunction here preserved plaintiffs' existing claims to the property extending to the low water mark of Lake Tahoe. The State has demonstrated no significant injury that would result to it from a granting of the preliminary injunction order. On the other hand, plaintiffs have asserted that they would stand to incur substantial harm from a refusal of their request for a preliminary injunction. Based on respondents' reasonable likelihood of prevailing on the merits, the trial court, within the appropriate bounds of its discretion, could have concluded that denial of the preliminary injunction order would threaten to cloud title so as effectively to prevent respondents' transfer of the lakeshore property, or would otherwise threaten to interfere with any interests in the lakeshore property presently possessed by respondents.

Finally, we do not agree with State that it is beyond the reach of injunctive relief in the instant circumstance because the application of Civil Code section 830 to these facts is the very question in issue in this litigation. (Cf. Code Civ. Proc., § 526, subds. 4 and 6; Civ. Code, § 3423, subd. (4).)

The order granting the preliminary injunction is affirmed.

REYNOSO, J.

I concur:

PUGLIA, P.J.

Who owns the land between the ordinary low-water mark and the ordinary high-water mark along the shoreline of California's *non-tidal*[1] navigable waters, including Lake Tahoe? Is it the State or the bordering property owner?

From at least 1916, and until 1970, the Attorney General of California took the position that the State owned the beds of non-tidal navigable lakes and streams only to *ordinary low-water mark*. (Ops.Cal.Atty.Gen. 3100, pp. 5-6 (1916); 23 Ops.Cal.Atty.Gen. 97 (1954); 43 Ops.Cal.Atty. Gen. 291 (1964).) By its letter of March 8, 1977, however, the Attorney General advised the State Lands Commission that the State asserts, and since 1970 has been asserting, sovereign ownership of the beds of navigable lakes and streams to *ordinary high-water mark*. When the Commission thereafter announced its intention to record notice of the State's claims in the recorder's office of counties where such lakes and streams are located, certain owners of property bordering on Lake Tahoe filed this action and obtained the challenged preliminary injunction against such recordation.

I

The majority does not reach the merits of the controversy. My colleagues conclude that on appeal from the issuance of a preliminary injunction they need only decide whether there is a reasonable probability that plaintiffs will ultimately prevail and whether a greater injury will

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[1]Crucial to a proper understanding of this case is the constant awareness that only non-tidal waters are involved. As I note hereinafter, non-tidal and tidal waters are governed by separate and different rules of law.

result from granting the injunction than from denying it. That general proposition is both correct (Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 528) and applicable here; therefore I concur in the majority opinion. But unlike the majority, I am not prepared to end the matter thus. Because I view the ownership issue, on the merits, as a pure question of law with a very clear answer, in the interests of judicial economy, I would resolve it here and now. No further evidence or hearing in the trial court could possibly change the result.

II

California Civil Code section 670, as enacted in 1872 and amended in 1873-1874, states: "The State is the owner of all land below tide-water, and below ordinary high-water mark, bordering upon tide water within the State; of all land below the water of a navigable lake or stream; . . ."

This is clarified in Civil Code section 830, also enacted in 1872,[2] and amended in 1874 to read: "Except where the grant under which the land is held indicates a different intent, the owner of the upland (when it borders on tide-water) takes to ordinary high-water mark; *when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; . . .*" (Emphasis added.)

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[2]In its original form, section 830 provided:

"When land borders upon tide water, or upon water which constitutes an exterior boundary of the State, the owner of the upland takes to the high water mark; when it borders upon a navigable lake where there is no tide, the owner takes to the edge of the lake at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

Section 830 has been widely accepted as establishing ordinary low-water mark as the limit of California's sovereign lands beneath non-tidal inland navigable lakes and streams. In addition to such treatment in the line of Attorney General's opinions cited above, it has been so treated in a number of reported decisions, including Los Angeles v. Aitken (1935) 10 Cal.App.2d 460, 467; Crews v. Johnson (1962) 202 Cal.App.2d 256, 258; and United States v. Gossett (9th Cir. 1969) 416 F.2d 565. Moreover, I note from the limited record before us that certain of the conveyances of property bordering Lake Tahoe specifically describe the waterward boundary as the line of "ordinary low water." None of the conveyances in the record refer to high water.

The asserted rationale for the State's repudiation of its former position begins with an 1850 statute providing that ". . . unless inconsistent with applicable state law, the common law of England shall be the rule of decision." (Stats. 1850, ch. 95, p. 219; see now Civ. Code, § 22.2.) The Supreme Court in Lux v. Haggin (1886) 69 Cal. 255, 384-385 ruled: "The act of 1850 adopts the common law of England. . . . And the expression 'common law of England" designates the English common law as interpreted as well in the English courts as in the courts of such of the states of the Union as have adopted the English common law. . . . And it was not the common law 'as the same was administered' at a certain date that it was adopted, but the common law. . . . The statute adopts the common law of England except where inconsistent with the constitutions and statutes, and there can be no good reason why, to ascertain the common

law of England, we should not refer to the decisions of English and American courts (in states where the common law prevails) rendered before and subsequent to the date of the statute."

The State then argues that pursuant to this definition the "common law" rule in 1850 (or at least prior to the enactment of section 830 in 1872) was sovereign ownership of non-tidal inland navigable lake and stream beds to ordinary high-water mark; once California adopted the high-water mark standard by "common law" incorporation, the subsequently enacted section 830 was but a "rule of construction of boundaries," in view of the introductory clause "[e]xcept where the grant . . . indicates a different intent." By its terms, the argument continues, section 830 does not purport to grant the State's sovereign lands and thus for sound policy reasons it cannot be construed as a *grant*, citing *inter alia*, People v. California Fish Co. (1913) 166 Cal. 576.

The State errs in its initial hypothesis. The common law was not sovereign ownership to high-water mark.

The earliest United States Supreme Court case to associate inland "navigable water" (and "high water") with title was Barney v. Keokuk (1876) 94 U.S. 324. In that landmark decision, the court summarized the American view of the common law of England on the subject: "By the common law, . . . [all lands beneath] navigable waters belong to the Crown; but as the only waters recognized in England as navigable were tide waters, the rule was often expressed as applicable to tide-waters only, . . ." (*Barney, supra* at p. 337.) The court then pointed out that the

reason for the rule was equally applicable to nontidal navigable waters, ". . . that reason being, that the public authorities ought to have entire control of the great passage ways of commerce and navigation, to be exercised for the public advantage and convenience. . . ." (*Barney, supra* at p. 338.)

The court went on: "The confusion of navigable with tide-water, found in the monuments of the common law, long prevailed in this country, notwithstanding the broad differences existing between the extent and topography of the British island and that of the American continent. It had the influence for two generations of excluding the admiralty jurisdiction from our great rivers and inland seas; and under the like influence it laid the foundation, in many States, of doctrines with regard to the ownership of the soil in navigable waters above tide-water at variance with sound principles of public policy. *Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine.* If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject, the correct principles were laid down in Martin v. Waddell [(1842) 41 U.S. 367], Pollard v. Hagan [(1845) 44 U.S. 212], and Goodtitle v. Kibbe [(1850) 50 U.S. 471]. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of Genesee Chief v. Fitzhugh [(1851) 53 U.S. 443], has declared that the Great Lakes and other navigable waters of the country, above

as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to the admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. *It properly belongs to the States by their inherent sovereignty,* and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water." (*Barney, supra* at p. 338.) (Emphasis added.)

Thus Barney v. Keokuk held in 1876 that the States may or may not assert sovereign ownership over the beds of inland navigable lakes and streams to high-water mark; it also made clear that the English common law of high water applied to tidal waters only, even though logically it should have applied as well to non-tidal waters. At the time *Barney* was decided, California Civil Code section 830 had been in effect for four years, thus reflecting California's option to claim title only to the low-water mark.

Prior to *Barney*, we know of only one state, Iowa, which had clearly asserted a claim of high-water ownership. The claim was upheld by the Iowa Supreme Court in McManus v. Carmichael (1856) 3 Iowa 1, and it was a later challenge to this unique Iowa rule which brought about Barney v. Keokuk.

In an effort to expand the reach of *McManus* beyond the borders of Iowa, the State cites an 1868 text, Houck, *A Treatise on the Law of Navigable Rivers* (1868) pages 118-119, quoting as follows: "In investigating the cases, it will be noticed, that some of the courts, while they repu-

diate the supposed Common Law as inapplicable to our great inland rivers, and consider them as navigable in the highest and broadest sense, yet carry the ownership of proprietor of the verge of the bank to low-water mark, thus neither following the Common Law, nor wholly abrogating it. There is no authority in the Common Law for any such distinction. If rivers are navigable, the owners go to high-water mark only; if not navigable, they belong to the riparians; and these views the courts of New York and Iowa hold as applicable to the Mississippi and Mohawk." I find this unpersuasive. The treatise refers to two cases, *McManus* and The People v. The Canal Appraisers (1865) 33 N.Y.Ri (6 Tiffany) 461. *McManus* clearly supports the argument; *Canal Appraisers* does not, though it relies on *McManus* and can easily be misinterpreted as a "high water" case. In actual fact it holds only that the bed of the Mohawk River belongs to the State, without explicit reference to high or low-water mark. Other New York cases decided both before and after *McManus* clearly establish New York as a "low water" jurisdiction. (See Stewart v. Turney (1923) 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960, 967; Canal Commissioners v. People (N.Y. 1830) 5 Wend. 423, 467; Champlain And St. Lawrence Rail Road Co. v. Valentine (N.Y. 1853) 19 Barb. 484; Ransom v. Schaeffer (1934) 153 Misc. 199, 274 N.Y.S. 570.)

We are left then with Iowa as the only American jurisdiction to adopt a "high-water mark" rule regarding non-tidal waters prior to 1872. On the other hand, a great many states during this time either made *no* sovereign claims on the beds of non-tidal waters, or claimed only to low-water mark. (See e.g., Delaney v. Boston (1839) 2 Del.

(2 Harr.) 489; Jones v. The Water Lot Co. of Columbus (1855) 18 Ga. 539; Middleton v. Pritchard (1842) 4 Ill. (3 Scam.) 510; Berry v. Snyder (1867) 66 Ky. (3 Bush) 266; Brown v. Chadbourne (1849) 31 Me. 9; Browne v. Kennedy (Md. 1821) 5 Harris 195; Commonwealth v. Chapin (1827) 22 Mass. (5 Pick.) 199; Norway Plains Co. v. Bradley (1872) 52 N.H. 86; Cobb v. Davenport (1867) 32 N.J.L. 369; Palmer v. Mulligan (N.Y. 1805) 3 Caines R. 307; June v. Purcell (1881) 36 Ohio St. 396; State v. Columbia (1887) 27 S.C. 137; Miller v. Mann (1882) 55 Vt. 475; Canal Commissioners v. The People, supra, 5 Wend. at pp. 466-467; West Roxbury v. Stoddard (1863) 89 Mass. (7 Allen) 158; Carson v. Blazer (Pa. 1810) 2 Binney 475, 479; Naglee v. Ingersoll (1847) 7 Pa. 185.) As pointed out by plaintiffs, even now the majority of American states do not claim high-water mark ownership. To illustrate, I append hereto a copy of Appendix A to plaintiffs' brief, which the State has not challenged.

As for English common law, although the distinction between tidal and non-tidal waters was not nearly as clear as early American writers contended, by 1868 the English courts accepted the American view of English law and held that the beds of non-tidal navigable waters were "prima facie" in private ownership. (Murphy v. Ryan (1868) 2 Ir. R.C.L. 143; see MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don't Hold Water*. 3 Fla. St. U.L.R. 511, 585-587 (1975).)[3]

[3]As *MacGrady* points out, "*Murphy v. Ryan* was an Irish case and thus was not technically binding on English courts. But it was cited and followed in England. . . . (3 Fla.St. U.L.R. 511, 585, fn. 390.)

The fact that one state adopted a high-water rule prior to 1872 certainly does not establish that rule as the "common law" for purposes of incorporation into California law.

III

The State argues that even if we do not accept the common law incorporation argument, upon achieving statehood in 1850 the State must have succeeded to all the sovereign lands theretofore possessed by the United States; and since Barney v. Keokuk established that federal sovereignty extended to high water, the State must have succeeded to the same ownership. Once again relying on the policy reasons expressed in such cases as People v. California Fish Co., supra, the State argues that section 830 cannot be construed as a *grant* of hundreds of miles of sovereign shoreline to unnamed private owners.

The simple answer again is that *Barney* was not decided until 1876, and thus cannot be relied upon to establish federal sovereignty in 1850.

Furthermore, commentators who have considered similar difficulties posed by divergent federal and state definitions of *navigability* have taken the position that grants of land are not involved. Title simply "springs" to the private owner by operation of law: "Of course, if W is navigable under the federal test, the state takes title by sovereignty, which title can later spring to O [the private owner] under *Barney* if W is nonnavigable under the state test." (MacGrady, *The Navigability Concept in the Civil and Common Law: Historical Development, Current Impor-*

tance, and Some Doctrines That Don't Hold Water, supra at p. 603.)

I honor the language of section 830 and would hold that California's sovereign title to the beds of navigable nontidal lakes and streams extends to the ordinary low-water mark. Above that the shoreline is owned by the owners of the adjoining upland. Accordingly I conclude on the merits that the preliminary injunction was properly granted.

IV

Having enunciated my conclusion, I briefly explain some of the arguably contrary cases cited by the State.

A. A contrary dictum in Churchill Co. v. Kingsbury (1918) 178 Cal. 554, 558, relied upon in 52 California Jurisprudence Second, Waters, section 800, page 448, was based upon a stipulation of the parties. The case did not consider Civil Code section 830[4] and has never been followed. A later Supreme Court case, Craig v. White (1921) 187 Cal. 489, 491-492, held that a United States patent of property along the shore of Clear Lake "under the established rules governing such transfers, conveyed title to the patentees to the *actual margin of the lake.* (Civ. Code, § 830 . . . .)" (Emphasis added.) The court's ensuing citation to Civil Code section 830 compels an interpretation of the emphasized phrase consistent with the language of the statute; i.e., margin (edge) of the lake "*at low-water mark.*"[5]

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[4]See 43 Opinions of the California Attorney General (1964) 291, 295, noting that the *Kingsbury* briefs also did not mention section 830.

[5]*Craig's* language and citation to section 830 were later quoted with approval in Anderson v. Trotter (1931) 213 Cal. 414, 421.

Moreover, cases which subsequently dealt with title to the very property involved in the *Churchill* decision concluded that the land in question *was not* sovereign property, but swamp and overflow land subject to conveyance by the State into private ownership in fee simple absolute. (Reynolds v. Churchill Co. (1921) 187 Cal. 543; Franklin v. Churchill Co. (1921) 187 Cal. 555; Franklin v. Churchill Co. (1925) 73 Cal.App. 304.)

B. The United States Supreme Court in Hardin v. Jordan (1891) 140 U.S. 371, 382-383, after discussing the Iowa high-water rule upheld in Barney v. Keokuk, supra, inaccurately stated, "The same view was taken in quite a recent case with regard to titles on the Sacramento River under the law of California," citing Packer v. Bird (1886) 71 Cal. 134. Actually, the one-page opinion in *Packer* simply held that the adjoining landowner's title extended "no farther than the edge of the stream." (71 Cal. at p. 135.) The court did not discuss what it meant by "edge of the stream," because the dispute involved title to an island in the center of the river. But since the major issue in the case was whether the 1872 or 1874 version of section 830 applied (under the 1872 version the upland owner along a navigable *stream* presumably took title to the *middle* of the stream[a]), the court's use of the statutory language "edge of the stream" must be taken to mean "edge of the . . . stream, at low-water mark."

The United States Supreme Court later reviewed the *Packer* decision (Packer v. Bird (1891) 137 U.S. 661),

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[a]This is apparent from reading the briefs of the parties in *Packer*, which were provided to the trial court and are therefore in the clerk's transcript.

but did not discuss its stateement in *Hardin* that the case established a high-water rule. Rather it quoted the ambiguous "edge of the stream" language, even though that language was of no value in the court's formulation that title ". . . will be limited according to the law of the State, either to low or high-water mark, or will extend to the middle of the stream." (*Id.* at pp. 669-670.)

V

Plaintiffs necessarily concede "that a limited public easement for recreational navigation exists over waters which are navigable for recreational purposes, even though the waters may inundate private property. *Bohn v. Albertson,* 107 Cal.App.2d 738, 742-743, 752-753 (1951); *People Ex Rel* [*sic*] *Baker v. Mack,* 19 Cal.App.3d 1040, 1060 (1971); *Hitchings v. Del Rio Woods Recreation and Park District,* 55 Cal.App.3d 560, 571. . . ." The judicial definition of navigability is sufficiently flexible to insure that the public interest will be protected. (See the "contemporary test" referred to in 45 Cal.L.Rev. 604, 617 (1957): i.e., can it "float a Supreme Court opinion.") The "public trust" doctrine also lurks here. (See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention* (1970) 68 Mich.L.Rev. 473.) The possible argument that the public easement or public trust doctrines include the right of the public to use the strip of land between high and low water during periods of low water has been rejected in New York and Wisconsin (see 31 A.L.R. 960 (1924)), but remains viable (see cases and comments collected in *MacGrady, supra,* 3 Fla.St. U.L.R. at p. 515, fn. 553).

But these issues are not yet before us, and I express no opinion thereon. I mention them only to point out that they are consequential matters whose ultimate resolution will be further delayed by the majority's unwillingness at this time to meet squarely the legal issue of this case.

PARAS J.

Appendix A

THE LIMIT OF SOVEREIGN CLAIMS TO LANDS UNDERLYING NONTIDAL NAVIGABLE WATERS

State	Limit of Sovereign Claim to Bed	Authorities
Alabama	Low-water mark	*Mobile Transp. Co. v. City of Mobile* (1907) 152 Ala. 409 [44 So. 976]; *Webb v. City of Demopolis* (1892) 95 Ala. 116 [13 So. 289]
Alaska	High-water mark	Alaska Stats. § 38.05.365; *State Dept. of Natural Resources v. Pankratz* (1975) 538 P.2d 984.
Arizona	Probably high-water mark	*State v. Bonelli Cattle Company* (1972) 180 Ariz. 258 [495 P.2d 1318], *rev'd on other grounds* (1973) 414 U.S. 313 [94 S.Ct. 517]
Arkansas	High-water mark	*U. S. Gypsum Co. v. Uhlhorn* (E.D.Ark. 1964) 232 F.Supp. 994; *Anderson v. Reames* (1942) 161 S.W.2d 947; *Harrison v. Fite* (8th Cir. 1906) 148 F. 781
Colorado	No policy	Declaratory relief action currently pending in federal district court in Colorado to determine who owns the bed of Grand Lake—the city, the state or the federal government
Connecticut	Low-water mark	*New York, N. H. & H. R. Co. v. Armstrong* (1918) 92 Conn. 349 [102 A. 791]
Delaware	Low-water mark	Delaware Stats. § 6151; *State ex rel. Buckson v. Pennsylvania Railroad Co.* (1969) 267 A.2d 455, *aff'd*, 273 A.2d 288 (1971)
Florida	High-water mark	Florida Stats. § 253.12; *Martin v. Busch* (1972) 93 Fla. 535 [112 So. 274]
Georgia	Low-water mark	Georgia Stats. § 85-1304; *Johnson v. State* (1902) 40 S.E. 807
Hawaii	Privately owned	Hawaii Stats. § 205-31;* *United States v. Kaiser Aetna* (D.Haw. 1976) 408 F.Supp. 42

State	Limit of Sovereign Claim to Bed	Authorities
Idaho	High-water mark	Idaho Stats. § 58-104; *Gasman v. Wilcox* (1934) 54 Idaho 700 [35 P.2d 265]; *Burrus v. Edward Rutledge Timber Co.* (1921) 34 Idaho 606 [202 P. 1067]; *Northern Pac. Ry. Co. v. Hirzel* (1916) 29 Idaho 438 [161 P. 854]
Illinois	1. *Streams and Rivers:* privately owned	*City of St. Louis v. Rutz* (1891) 138 U.S. 226 [11 S.Ct. 337]; *Trustees v. Schroll* (1887) 120 Ill. 509 [12 N.E. 243]
	2. *Meandered Lakes:* "waters edge" or low-water mark	Ill. Stats., Ch. 19, § 71; *Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296—"water's edge" construed to be low-water mark]; *Seaman v. Smith* (1860) 24 Ill. 521 ["water's edge" construed to be the line at which the water usually stands when free from disturbing causes]
Indiana	Low-water mark	*Irvin v. Crammond* (1915) 58 Ind.A. 540 [108 N.E. 539]; *Sherlock v. Bainbridge* (1968) 41 Ind. 35 [35 Am. Rep. 302]
Iowa	High-water mark	*Mather v. State* (1972) 200 N.W.2d 498; *Peck v. Alfred Olsen Construction Co.* (1931) 238 N.W. 416; *Barney v. Keokuk* (1876) 94 U.S. 324; *McManus v. Carmichael* (1856) 3 Iowa 1
Kansas	High-water mark	*Siler v. Dreyer* (1958) 183 Kan. 419 [327 P.2d 1031]
Kentucky	Privately owned	*Walker v. Felmont Oil Corp.* (6th Cir. 1957) 240 F.2d 912; *City of Covington v. State Tax Commission* (1929) 21 S.W.2d 1010; *Hogan v. McMurtry* (1827) 21 Ky (5 T.B. Mon.) 181
Louisiana	1. *Streams and Rivers:* low-water mark	*State v. Placid Oil Co.* (1974) 300 So.2d 154, *cert. denied* 95 S.Ct. 784, *rehrg. denied* 95 S.Ct. 1343; Op. Atty.Gen. 1938-40, p. 715
	2. *Lakes:* high-water mark	*State v. Placid Oil Co., supra;* Op.Atty.Gen. 1938-40, p. 229; Louisiana Civil Code §§ 453, 455 and 457

State	Limit of Sovereign Claim to Bed	Authorities
Maine	Low-water mark	Mass. Colonial Ordinance of 1641-47; *Brastow v. Rockport Ice Co.* (1885) 77 Me. 100; *Wood v. Kelley* (1849) 30 Me. 47
Maryland	Privately owned	Maryland Stats. §§ 9-101 *et seq.*; *Bowie v. Western Maryland R. Co.* (1918) 133 Md. 1 [104 A. 461]; *Day v. Day* (1865) 22 Md 530; *Browne v. Kennedy* (1812) 5 H & J (Md.) 195
Massachusetts	Low-water mark	Mass. Colonial Ordinance of 1641-47; *Atty. Gen. v. Revere Copper Co.* (1890) 152 Mass. 444 [25 N.E. 605]; *West Roxbury v. Stoddard* (1863) 7 Allen, 158
Michigan	1. *Great Lakes:* "waters edge"	Inland Lakes and Streams Act, Michigan Stats. §§ 11.-475(1) *et seq.*; *Hilt v. Weber* (1930) 252 Mich. 198 [233 N.W. 159]; *Ainsworth v. Munuskong etc. Club* (1909) 159 Mich. 61 [123 N.W. 802]
	2. *Other navigable waters:* privately owned	*Nedtweg v. Wallace* (1926) 237 Mich. 14 [208 N.W. 51]
Minnesota	Low-water mark	*Mitchell v. City of St. Paul* (1948) 31 N.W.2d 46; *State ex rel. Jackson County v. District Ct.* (1920) 146 Minn. 150 [178 N.W. 595]; *Snyder v. Great Northern Ry. Co.* (1914) 127 Minn. 518 [148 N.W. 617]
Mississippi	Privately owned	*Culley v. Pearl River Industrial Commission* (1959) 108 So.2d 390; *Anderson-Tully Co. v. Tingle* (1948) 166 F.2d 224; *The Steamboat Magnolia v. Marshall* (1860) 39 Miss. 109
Missouri	Low-water mark	*Conran v. Girvin* (1961) 341 S.W.2d 75; *Frank v. Goddin* (1906) 193 Mo. 390 [91 S.W. 1057]; *State ex rel. Citizens Electric Lighting & Power Co. v. Longfellow* (1902) 169 Mo. 109 [69 S.W. 374]

State	Limit of Sovereign Claim to Bed	Authorities
Montana	Low-water mark	Montana Stats. § 67-712; *United States v. Eldredge* (1940) 33 F.Supp. 337; *Herrin v. Sutherland* (1925) 74 Mont. 587 [241 P. 328]
Nebraska	Privately owned	*Nebraska v. Iowa* (1972) 406 U.S. 117; *U. S. v. Phillips* (1931) 56 F.2d 447
Nevada	Low-water mark [boundary currently disputed by state]	*Shoemaker v. Hatch* (1878) 13 Nev. 261
New Hampshire	1. *Lakes of 20 acres or more:* high-water mark	New Hampshire Stats. § 271:20; *Whitcher v. State* 87 N.H. 405 [181 A. 549]; *State v. Great Falls Mfg. Co.* (1912) 76 N.H. 373 [83 A. 126]
	2. *Rivers and Streams:* privately owned	*New Hampshire Water Resources Bd. v. Lebanon Sand & Gravel Inc.* (1967) 108 N.H. 254 [233 A.2d 828]
New Jersey	Low-water mark	*Baker v. Normanoch Association* (1957) 25 N.J. 407 [136 A.2d 645]; *Kanouse v. Stockbower* (1891) 48 N.J.E. 42 [21 A. 197]
New Mexico	No policy	New Mexico Attorney General's office has indicated that there are no navigable waters in that state
New York	Low-water mark	*Champlain & St. L. R. Co. v. Valentine* (1853) 19 Barb. (N.Y.) 484; *Canal Commissioners & Appraisers v. People* (1830) 5 Wend. (N.Y.) 447; *Ransom v. Schaeffer* (1934) 153 Misc. 199, 274 N.Y.S. 570; *Stewart v. Turney* (1921) 117 Misc. 398, 191 N.Y. Supp. 342, *rev'd on other grounds*, 197 N.Y.Supp. 81 (1922)
North Carolina	Low-water mark	*State v. Eason* (1894) 114 N.C. 787 [19 S.E. 88]
North Dakota	Low-water mark	North Dakota Stats. § 47-01-15; *Hogue v. Bourgois* (1955) 71 N.W.2d 47; *Gardner v. Green* (1937) 271 N.W. 775; *Roberts v. Taylor* (1921) 181 N.W. 622

State	Limit of Sovereign Claim to Bed	Authorities
Ohio	1. *Great Lakes:* low-water mark 2. *Other nontidal navigable waters:* privately owned	*Sloan v. Biemiller* (1878) 34 Ohio St. 492 *State ex rel. Brown v. Newport Concrete Co.* (1975) 44 Ohio App.2d 121 [336 N.E. 2d 453]; *State ex rel. Anderson v. Preston* (1963) 2 Ohio App.2d 244 [207 N.E. 2d 664]
Oklahoma	High-water mark	*State v. Nolegs* (1914) 40 Okl. 479 [139 P. 943]
Oregon	High-water mark	Oregon Stats. §§ 274.005 *et seq.*; *Brusco Towboat Co. v. State, By and Through Straub* (1977) 567 P.2d 1037; *Hume v. Rogue* (1907) 51 Or. 237 [83 P. 391]
Pennsylvania	Low-water mark	*Shaffer v. Baylor's Lake Association* (1958) 392 Pa. 493 [141 A.2d 583]; *Miller v. Lutheran Conf. & Camp Ass'n* (1938) 331 Pa. 241 [200 A. 646]; *Pursell v. Stover* (1885) 110 Pa. 43
Rhode Island	Privately owned (?)	The Rhode Island Attorney General's Office indicated that Rhode Island follows the common law test of navigability—however, that policy has never been judicially confirmed
South Carolina	Privately owned	*McDaniel v. Greenville Power Co.* (1913) 78 S.E. 980; *State v. City of Columbia* (1887) 3 S.E. 55
South Dakota	Low-water mark	So. Dakota Stats. §43-17-2; *Hillebrand v. Knapp* (1937) 65 S.D. 414 [274 N.W. 821]; *State v. Deisch* (1917) 38 S.D. 560 [162 N.W. 365]; *Flisrand v. Madson* (1915) 35 S.D. 457 [152 N.W. 796]
Tennessee	Low-water mark	*Hurley v. American Enka Corp.* (E.D.Tenn. 1950) 93 F.Supp. 98; *Webster v. Harris* (1902) 111 Tenn. 668 [69 S.W. 782]; *Martin v. Nance* (1859) 40 Tenn. (3 Head) 649
Texas	"Gradient Boundary"	*Heard v. Town of Refugio* (1937) 103 S.W.2d 728; *Diversion Lake Club v. Heath* (1935) 86 S.W.2d 441

State	Limit of Sovereign Claim to Bed	Authorities
Utah	High-water mark/ meander line	*Utah v. U. S.* (1971) 403 U.S. 9 [91 S.Ct. 1775—meander line]; *Provo City v. Jacobsen* (1947) 111 U. 68 [181 P.2d 213—High-water mark]; *State v. Rolio* (1927) 71 U. 91 [262 P. 987]
Vermont	Low-water mark	*Donahue v. Conant* (1929) 102 Vt. 108 [146 A. 417]; *Hazen v. Perkins* (1918) 92 Vt. 414 [105 A. 249]; *Jakeway v. Barrett* (1865) 38 Vt. 316
Virginia	Low water mark	Virginia Stats. § 62.1-2; *U.S. v. Smoot Sand & Gravel Corp.* (1957) 248 F.2d 822; *Taylor v. Commonwealth* (1904) 102 Va. 759 [47 S.E. 875]; *McDonald v. Whitehurst* (1891) 47 F. 757
Washington	High-water mark	Constit. Art. 17, § 1; *Wilbour v. Gallagher* (1969) 77 Wash.2d 306 [462 P.2d 232]; *State ex rel. Ham v. Superior Court* (1912) 70 Wash. 442 [126 P. 945]; *Van Siclen v. Muir* (1907) 46 Wash. 38 [89 P. 188]
West Virginia	Low water mark	*Carpenter v. Ohio River Sand & Gravel Corp.* (1950) 134 W.Va. 587 [60 S.E.2d 212]; *Campbell Brown & Co. v. Elkins* (1956) 93 S.E. 2d 248; *Union Sand & Gravel Co. v. Northcott* (1928) 102 W.Va. 519 [135 S.E. 589]
Wisconsin	1. *Lakes:* high-water mark	*Mayer v. Grueber* (1965) 29 Wis.2d 168 [138 N.W.2d 197]; *Doemel v. Jantz* (1923) 180 Wis. 225 [193 N.W. 393]; *Illinois Steel Co. v. Bilot* (1901) 109 Wis. 418 [84 N.W. 855]
	2. *Rivers and Streams:* privately owned	Wisc. Stats. § 30.10; *Angelo v. Railroad Commission* (1928) 217 N.W. 570
Wyoming	No policy	According to the Wyoming Attorney General's Office, there are only two "navigable" bodies of water in that state and they are both federally owned and regulated

Appendix I

[No. AO26746. First Dist., Div. One. Mar. 21, 1986.]

Raymond R. Lyon et al.,
Plaintiffs and Appellants,

v.

Western Title Insurance Company,
Defendant and Respondent.

Opinion

ELKINGTON, J.—Many years ago the State of California granted title to a patent applicant of about 500 acres of land, between the high water mark and low water mark at the southern end of Clear Lake in Lake County. At the time, as it does now, Civil Code section 830 provided that such a grantee "takes to the edge of the lake . . . at low water mark." And it was judicially determined law that the land between the high and low water mark of the lake was "irrevocably conveyed into absolute private ownership" (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482 [91 Cal.Rptr. 23, 476 P.2d 423]) with "unrestricted title to the grantee" (*Alameda Conservation Assn. v. City of Alameda* (1968) 264 Cal.App.2d 284, 287 [70 Cal.Rptr. 264], overruled on other grounds in *City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 532 [162 Cal.Rptr. 327, 606 P.2d 362]), "to the low-water mark" (*United States v. Gossett* (C.D.Cal. 1967) 277 F.Supp. 11, 13), and "to the edge of the lake . . . at low-water mark" (23 Ops.Cal.Atty.Gen. 306, 307 (1954)).

And when such grants by the states are made, the states may *not* constitutionally "impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee." (*Packer v. Bird* (1891) 137 U.S. 661, 669 [34 L.Ed. 819, 821, 11 S.Ct. 210].)

Following mesne conveyances of the 500 acres, Raymond R. Lyon and Margaret E. Lyon, his wife (hereafter for convenience in the singular, Lyon), purchased the property in 1964, relying on the then law's provision that they were taking absolute title to the lake's low water mark. But then in 1981, the state's Supreme

Court in *State of California v. Superior Court (Lyon)* (1981) 29 Cal.3d 210 [172 Cal.Rptr. 696, 625 P.2d 239] (hereafter *Lyon*) rejected the earlier settled law, holding that although title had passed, it was taken subject to a public trust requiring him to restore the land to, and preserve it in, *its "natural state."* Lyon, and others similarly situated, are thus deprived of any beneficial use of the land they had bought and paid for, under the law's assurance that they were acquiring absolute title to the lake's low water mark.

Few would deny the right of the state, under lawful procedures, to retake such land for a public purpose or need. But few also would quarrel with California's Constitution, article I, section 19, which commands that: "Private property may be taken . . . for public use *only* when just compensation [is] paid to . . . the owner." (The italics is ours.)

It is the public policy of this state that an opinion of its Courts of Appeal shall be published, among other reasons, if it "criticizes with reasons given, an existing rule" of law. (Rule 976(b)(1), Cal. Rules of Court.) We have certified this opinion for publication for, respectfully, it criticizes with reasons given the rule announced by *Lyon.*

In the *action presently before us*, the demurrer of defendant Western Title Insurance Company (hereafter Western) to the first amended complaint (hereafter complaint) of Lyon was sustained by the superior court. Lyon declined to amend his complaint and judgment of dismissal of the action was entered. The instant appeal was taken by Lyon from the judgment of dismissal.

We recount what will reasonably be termed the historical-factual-procedural-legal context of the appeal.

Following our War of Independence the 13 newly created states became the owners of the ocean tidelands bordering upon them, of the navigable waters lying within their borders, and of the land below the natural high water lines of their navigable inland lakes and streams. And upon the adoption of the federal Constitution, the United States similarly held such waters and lands of its nonstate territories in trust for states which might be created in

the future. Upon California's admission to the Union in 1850, it succeeded to such tidelands, and water and lands within its borders, upon an "equal footing" with other states. (*Montana v. United States* (1981) 450 U.S. 544, 551 [67 L.Ed.2d 493, 501, 101 S.Ct. 1245].)

But such rights which were granted to, or held by, the several states were nevertheless subject to the transcendent authority of Congress over *navigable* waters, i.e., "to regulate commerce with foreign nations, and among the several states" (U.S. Const., art. I, § 8, cl. 3; *Montana v. United States, supra*, at p. 551 [67 L.Ed.2d at p. 501]). As to the inland waterways coursing upon two or more states, the federal interest in retaining control over commerce and navigation was substantial; however, as to *navigable* lakes and streams contained *wholly* within a state, Congress neither had, nor imposed, any authority.

"If they [the states] choose to resign to the riparian proprietor, rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (*Barney v. Keokuk* (1877) 94 U.S. 324, 338 [24 L.Ed. 224, 228].) "This rule has been followed consistently." (Note (1982) 70 Cal.L.Rev. 1138, 1141.) "[I]t depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised." (*Hardin v. Jordan* (1891) 140 U.S. 371, 382 [35 L.Ed. 428, 433, 11 S.Ct. 808].) "[I]t has become established almost without argument that . . . the effect of the grant on the title to adjoining submerged land will be determined by the law of the state where the land lies." (*Hardin v. Shedd* (1903) 190 U.S. 508, 519 [47 L.Ed. 1156, 1157, 23 S.Ct. 685].) And when such grants by the states are made, the states may *not* constitutionally "impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee." (*Packer v. Bird, supra,* 137 U.S. 661, 669 [34 L.Ed. 819, 821].)

The courts of California had long been in agreement.

"The administration of [the entrusted submerged lands] by the state is committed to the Legislature, and a determination of that branch of government made within the scope of its powers is conclusive in the absence of clear evidence that its effect will be

to impair the power of succeeding legislatures to administer the trust in a manner consistent with its broad purposes. . . . In such a case the state through the Legislature may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When [such lands] have been so freed from the trust . . . they may be *irrevocably conveyed into absolute private ownership.*" (*City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 482, and see fn. 17.) "The attitude of the Supreme Court of the United States has been consistent in leaving the question of private water rights, *which do not involve federal or interstate interests, to the control of local state policies.*" (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 366 [40 P.2d 486], and see authority there collected.) "Although a state owns the lands underlying its bays . . ., it holds them in trust for the public for purposes of navigation and commerce. . . . *But this trust is terminable.* Upon proper legislative determination, *such lands may be transferred by the state free of the trust.* Conveyance of like lands under the acts of 1868 and 1870 *does in fact so terminate the trust and pass unrestricted title to the grantee.*" (*Alameda Conservation Assn. v. City of Alameda, supra,* 264 Cal.App.2d 284, 287.) And when a grant or patent of land sometimes submerged by an adjoining watercourse is issued by the state, it conveys *"the fee simple title to said lands."* (*Perry v. State of California* (1956) 139 Cal.App.2d 379, 380-381 [293 P.2d 480].) (The italics of this paragraph are ours.)

"[T]he same incidents of the trust applicable to tidelands also apply to nontidal navigable waters." (*Lyon, supra,* 29 Cal.3d p. 231.)

Long ago (1874), the Legislature of California enacted Civil Code section 670 which iterated, as here relevant, the above-noted rule that upon the state's admission to the Union, it became the absolute owner of land below tide water and below the water of all navigable lakes and streams lying wholly within its borders. The statute, as here relevant, declared: "The State is the owner of

all land below tidewater, and below ordinary high-water mark, . . .; of all land below the water of a navigable lake or stream."[1]

But contemporaneously with Civil Code section 670 the Legislature chose to treat differently the land below tidewater, and land below its inland navigable lakes and streams. While retaining title to land below tidewater, by enactment of Civil Code section 830, it ceded to the riparian owners of the state's inland navigable streams and lakes, all land between their high and low water marks. Section 830, as here relevant, has since provided that where a riparian owner's land "borders upon a navigable lake or stream . . ., *the owner takes to the edge of the lake or stream, at low water mark*, . . ."(The italics are ours.)[2]

And with the adoption of Civil Code section 830, the Legislature (1874) amended Code of Civil Procedure section 2077, subdivision 5, to read, as relevant: "When a navigable lake . . . is the boundary, the rights of the grantor *to low-water mark* are included in the conveyance."[3]

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[1] Civil Code 670, in its entirety, states: "The State is the owner of all land below tidewater, and below ordinary high-water, bordering upon tidewater within the State; of all land below the water of a navigable lake or stream; of all property lawfully appropriated by it to its own use; of all property dedicated to the State; and of all property of which there is no other owner."

[2] The full text of Civil Code section 830 recites: "Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high-water mark; when it borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

[3] The entire relevant text of Code of Civil Procedure, section 2077, follows: "The following are the rules for construing the descriptive part of a conveyance of real property, when the construction is doubtful and there are no other sufficient circumstances to determine it: . . . Five—When tidewater is the boundary, the rights of the grantor to ordinary high-water mark are included in the conveyance. When a navigable lake, where there is no tide, is the bondary, the rights of the grantor to low-water mark are included in the conveyance."

Thus, for more than a hundred years, Civil Code section 830 and Code of Civil Procedure section 2077 were deemed to have "irrevocably conveyed into *absolute* [our italics] private ownership" (*City of Long Beach v. Mansell, supra*, 3 Cal.3d p. 482), with "*unrestricted*" [our italics] title to the grantee" (*Alameda Conservation Assn. v. City of Alameda, supra*, 264 Cal.App.2d p. 287), and "the *fee simple title* [our italics] to said lands" (*Perry v. State of California, supra*, 139 Cal.App.2d pp. 380-381).

Federal courts were in agreement: "Since enactment of California Civil Code § 830, it has been the law in California that the state's title to lands under navigable streams extends only to the low water-mark." (*United States v. Gossett, supra*, 277 F.Supp. 11, 13.)

And when administrative agencies of the state inquired of its successive Attorneys General, they were advised that: "It is now settled law in California that *private ownership extends to low water mark* [our italics] of non-tidal navigable waters" (43 Ops.Cal.Atty.Gen. 291 295 (1964)); that "under Civil Code section 830 the owner of land bordering a navigable lake *owns to the edge of the lake at low-water mark*" (our italics, 30 Ops.Cal.Atty.Gen. 262, 269 (1957); and that "the littoral owner of land bordering on a navigable lake takes to the '*edge of the lake . . . at low-water mark*' " (our italics), 23 Ops.Cal.Atty.Gen. 306, 307).

But then, March 20, 1981, the rule of *Lyon, supra*, 29 Cal.3d 211, was announced.

Lyon holds that although the owner of land alongside a navigable lake or stream owns *title* between its high-water mark and its low-water mark, that title is subject to a public trust requiring him to *restore and maintain the land in its "natural state."*

The rationale: "Lands of the type involved in this proceeding constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the residents of the state." (*Lyon, supra*, 29 Cal.3d p. 216.)

Lyon thus rejected, sub silentio, the court's earlier rule of *City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 482, that upon such a grant the land above the low water mark was "*irrevocably* conveyed into *absolute* private ownership" (our italics), and the holding of *Peabody v. City of Vallejo, supra*, 2 Cal.3d 351, 356, that the state and its Legislature were free to do so. So also, the court rejected the rules long ago announced by the United States Supreme Court: "if they [the states] choose to resign to the riparian proprietor, rights which properly belong to them in their sovereign capacity, it is not for others to raise objections." (*Barney v. Keokuk, supra*, 94 U.S. 324, 338 [24 L.Ed. 224, 228]); and, referring to a grant of land by California upon one of its inland waterways, the high court said that the states may *not* constitutionally "impair the efficacy of the grants, or the use and enjoyment of the property, by the grantee." (*Packer v. Bird, supra*, 137 U.S. 661, 669.)

Lyon of *Lyon* was and is the Lyon of the case at bench.

Clear Lake in Lake County, California, is a navigable body of water about 64 square miles in area. The lake's surface rises and falls with the seasons. About 800 acres of land known as the Anderson Marsh, along Clear Lake's southern shore, had been patented and conveyed by California to the predecessors in interest of Lyon. About 500 acres of the land were marshland which was covered with water when the lake was at its highest; it was between the lake's natural low water and high water marks. The remainder lay landward of the lake's high water mark.

In 1971, Lyon was engaged in negotiations for the sale of the entire property, in contemplation of which he purchased policies of title insurance from Western. The policies, with some exclusions, generally insured in Lyon fee simple title to the entire 800 acres. For some reason the sale of the property was not consummated, but the title insurance policies nevertheless were paid for and remained in force.

Thereafter, seeking permission to repair a levee and thus reclaim a portion of the lower marshland, Lyon was advised by a state agency that the state claimed ownership of the portion of the property which extended below the lake's high water mark. An

action was filed by Lyon seeking to quiet title to his property against the State of California's claim. The state responded with a cross-complaint to quiet title, among other things, to the portion of Anderson Marsh between high and low water. The County of Lake, apparently concerned with the diminution of its real estate tax base were the state to prevail, intervened in the action on behalf of Lyon. On the parties' respective motions for summary judgment the trial court ruled in favor of Lyon, and judgment was entered accordingly. The state sought relief by an application for a writ of mandate. The mandate proceedings reached the California Supreme Court, which by a four-to-two opinion (*Lyon, supra*, 29 Cal.3d 210) reversed, and directed entry of summary judgment for the state in the manner we shall hereafter point out.

The *Lyon* decision is now *final.*

Lyon, as noted, held that, although Lyon owned "*title*" to the 500-acre portion of Anderson Marsh which lay between the high water and low water marks of Clear Lake, such title was impressed with a public trust commanding, among other things, that the 500 acres of marshland be restored to, and maintained in, its "*natural state.*"

It will be seen, and as noted, that under *Lyon,* the riparian owners, including Lyon, alongside California's navigable inland waterways were denied beneficial use of, or right to improve in any way, such of their land as fronted upon the waterway at high water. The ruling was of *first impression* in California and, insofar as we have been able to determine, elsewhere in the United States.

Contemporaneously with *Lyon,* the high court decided *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240 [172 Cal.Rptr. 713, 625 P.2d 256], affecting the California shores of Lake Tahoe, in which it reached substantially the same result. *Lyon,* however, has been described as the leading case on the new doctrine.

As a result of *Lyon,* according to Lyon, the most valuable part of his property, fronting the Clear Lake, had been rendered valueless. It may not be improved, not even used, in any beneficial or meaningful way. For it must now be preserved by him in its

"natural state" as marshland. Yet, as noted, under such circumstances, a state may not *constitutionally* "impair the efficacy of the grants, or *the use and enjoyment of the property*, by the grantee." (our italics, *Packer v. Bird, supra*, 137 U.S. 661, 669.)

For more than 100 years Californians have been acquiring land on the shores of inland waterways on the reasonable belief and expectation that they would own and enjoy, and might construct improvements upon, the land to the low water mark. There are no less than 4,000 miles of such land (see *Lyon, supra*, 29 Cal.3d p. 216) most, or much, of it converted from its "natural state" to residential and commercial property, and farmland. Those 4,000 miles must reasonably concern thousands, perhaps hundreds of thousands, of now devalued land titles acquired in reliance upon the rule of Civil Code section 830. The farms, homes and improvements thereon are now declared by *Lyon* to be unlawful, for they were fashioned contrary to a public trust that the land be maintained in its "natural state."

The reclamation and improvement of marsh and overflowed land, such as the Anderson Marsh property of Lyon, has been *expressly* encouraged and implemented by California's Legislature during the past century. Statutory provisions for reclamation of such land abound in our law, "because of the public benefit derived therefrom." (Islais Creek Rec. Dist. v. All Persons (1927) 200 Cal. 277, 280 [252 P. 1043].) "The reclamation of the vast bodies of swamp and overflowed land in this state may justly be regarded as a public improvement of great magnitude, and of the utmost importance to the community." (*Laguna etc. Dist. v. Chas. Martin Co.* (1904) 144 Cal. 209, 213 [77 P. 933].) Indeed, much of such reclaimed land of the state lies in the so-called Delta area, at the freshwater confluence of the Sacramento and San Joaquin rivers, of which respected authority states: "The aggrading river and the inland-growing Delta were surrounded by malarial swamps. . . . There was nothing pleasant or healthful about these natural, historic conditions. They caused death, disease, and untold suffering. . . . The historical record is conclusive on all these points." ("An Assessment of Planning for Water-Pollutions Control . . . [December 1975] A Report Submitted by: INTREC, INC. Under Contract NSF-C-1046 to the National

Science Foundation Scientific, Technological, and International Affairs Directorate Science and Technology Policy Office; Reproduced by National Technical Information Service *U.S. Department of Commerce*," our italics.)

On the instant appeal Lyon insistently contends that *Lyon's* innovative public trust doctrine which did not exist when he acquired Anderson Marsh, is bad law, unsupported by authority, violative of the separation of powers doctrine explicated by the state and federal Constitutions, and has taken his property for public use contrary to the state's Constitution, article I, section 19.

Respectfully, we find ourselves in agreement.

We do not think reasonable, the comment of *Lyon*: "We emphasize that Lyon is not deprived of the use of the lands between low and high water, and that he may utilize them in any manner not incompatible with the public's interest in the property." (29 Cal.3d at p. 232.) To the contrary, we believe that Lyon, required to maintain his 500 acres of marshland in their "natural state, " is deprived of any *beneficial* use of that land. Nor do we find the language of Civil Code section 830—that when the land "borders upon a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low-water mark"—to be "ambiguous" as declared by *Lyon*. And surely under the long and uniform interpretation of Civil Code section 830, it may not now reasonably be said, as does *Lyon*, that "it is to be presumed that [Lyon] bought with knowledge of the law on the subject." Instead, we opine, it may more reasonably be said that Lyon purchased the property in the reasonable belief that California could *not constitutionally* "impair the efficacy of the grants, or *the use and enjoyment of the property*." (Our italics, *Packer v. Bird, supra*, 137 U.S. 661, 669 [34 L.Ed. 819, 821].)

Apparently unconsidered by *Lyon* was the tax revenue loss occasioned by the holding that 4,000 miles of valuable waterfront property must remain unused and unimproved in its natural state, with consequent diminution of its fair market value. The ruling, if

implemented, will have profound effect upon the real estate tax revenues of the state's counties.

Moreover, since *Lyon* teaches that any past or future grant of such lands by the state is conditioned upon its described public trust, we think it here reasonably bears *emphasis* that such grants by the state have been held to be of "*absolute private ownership*" and "*freed from the trust*" (*City of Long Beach v. Mansell, supra,* 3 Cal.3d 462, 482), of *"the fee simple title"* (*Perry v. State of California, supra,* 139 Cal.App.2d 377, 380-381), and *"free of the trust" (Alameda Conservation Assn. v. City of Alameda, supra,* 264 Cal.App.2d 284, 287).

We find nothing supportive of *Lyon's* innovative holding in *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110], described by *Lyon* (29 Cal.3d P.227) as the "seminal case on the scope of the public trust doctrine."

Illinois Central Railroad Company v. Illinois concerned the interstate, navigable, freshwater, nontidal (see *Lyon*, 29 Cal.3d p. 227), Lake Michigan. The City of Chicago had fashioned a harbor about two square miles in area. The Illinois Legislature, in 1869, by a much criticized "Lake Front Act" had granted the railroad company perpetually *submerged* land extending for a mile under the water of the harbor; it was to be filled in for railroad purposes. The War Department, and others, claimed that the harbor's use for navigation was interfered with, and a subsequent Legislature repealed the Lake Front Act. The railroad company claimed vested right under the act's grant, and the State of Illiniois sued to vindicate the act's repeal. The State of Illinois prevailed. The case did *not* concern land between the lake's, or harbor's low water and high water marks, except perhaps peripherally; such an area was not in issue, nor was it even mentioned in the high court's opinion. As material here the opinion simply held that the grant of continuously submerged land under the waters of Lake Michigan interfered unlawfully with the public right of interstate navigation and commerce.

And we note that both *before,* and *after, Illinois Central Railroad Company v. Illinois,* the courts of Illinois clung to the

rule that: "The riparian owner [has] the right to the *exclusive use* [our italics] of the banks [of an inland waterway] to the low water mark." (*Ensminger v. The People* ex rel. *Trover* (1868) 47 Ill. 384, 391; *City of Peoria v. Central Nat. Bank* (1906) 224 Ill. 43 [79 N.E. 296, 297].)

Nor do we find the several cases cited in, and relied upon by, *Lyon* (29 Cal.3d 210,221-222, fn. 9) to support its holding. They simply point up instances where, *unlike California*, a minority of states had elected, as was their right (see *Hardin v. Jordan, supra*, 140 U.S. 371, 382 [35 L.Ed. 428, 433]: *Barney v. Keokuk, supra*, 94 U.S. 324, 328 [24 L.Ed. 224, 227]), to limit private ownership along the banks of their navigable inland waterways to the high water mark.

Finally, we observe it to be the law that under "the *separation of powers doctrine*, the fundamental doctrine which recognizes that in the absence of some overriding constitutional, statutory or charter proscription, *the judiciary has no authority to invalidate duly enacted legislation.*" (*City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, 915 [120 Cal.Rptr. 707, 534 P.2d 403], our italics.) "'[T]he courts should only exercise those common law powers which are not otherwise repugnant to or inconsistent with our Constitution and statutes; *inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy.*'" (*People v. Municipal Court* (*Runyan*) (1978) 20 Cal.3d 523, 528 [143 Cal.Rptr. 609, 574 P.2d 425 2 A.L.R.4th 681], italics in original.) And: "[I]f the subject-matter of the legislation be of such a nature that there is any doubt of its character, or if by any possiblility the legislation may be for the welfare of the public, *the will of the legislature must prevail over the doubts of the court.*" (*In re Madera Irrigation District* (1891) 92 Cal. 96, 309-310 [28, P. 97], italics added.)

And, as recently as 1971, the state's high court, referring to the public trust of this case has held (the italics are ours): "It is a *political* question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished."

(*Marks v. Whitney* (1971) 6 Cal.3d 251, 260-261 [98 Cal.Rptr. 790, 491 P.2d 374].)

Article X, section 4 of the state's Constitution says that "the *Legislature* [our italics] shall enact such laws . . . so that access to the navigable waters of this state shall be always attainable for the people thereof." And Article XA of the same Constitution calls upon the *Legislature* to implement its "Water Resources Development" provisions. It has been expressly held by earlier decisions of our high court that: "The administration of the trust [for commerce and navigation] is committed to the *Legislature*." (*City of Long Beach v. Mansell, supra*, 3 Cal.3d 462, 482, fn. 17, our italics) And where: "the *Legislature* has 'found and determined' that . . . submerged lands [are] no longer required for navigation, commerce, and fisheries . . . [t]hat determination and finding is conclusive upon this court in the absence of evidence indicating that the abandonment of the public trust will impair the power of succeeding *legislatures* to protect, improve, and develop the public interest in commerce, navigation, and fisheries." (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 206-207 [282 P.2d 481], italics added.)

Further, it should be needless to *iterate* that, in California, private property may not constitutionally be taken for public use without payment of just compensation to its owner.

We are not alone in our criticism of *Lyon:* See Note, *Lyon and Fogerty, Unprecedented Extensions of the Public Trust* (1982) 70 Cal.L.Rev. 1138; *The Public Trust after Lyon and Fogerty, Private Interests and Public Expectations—A New Balance* (1983) 16 U.C. Davis L. Rev. 631; Note, *Property Boundaries—Civil Code Section 830 Grants Nontidal Shorezone to Private Landowners, Subject to Tidelands Trust* (1982) 22 Santa Clara L.Rev. 559.

Nevertheless, we are told by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937], that "all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." Obedient to that rule, and regardless of the views we have

expressed, we must, and do, declare the holding of *Lyon* to be the law of this state.

We pass on to the second of Lyon's contentions, that Western had insured title to his land against such a public trust as was declared by *Lyon.*

Seeking somehow to recoup the loss brought about by *Lyon,* the instant action was brought by Lyon against Western, on the theory that Western had insured an *unconditional* fee simple title to Anderson Marsh. But Western, as noted, demurred to the complaint, pointing out that its title insurance policies, among other things, *excluded:* "Any claim or title of the State of California and/or the United States of America as to all or any portion of said land lying *within the bed of Clear Lake . . . under natural conditions.*" And, as we have earlier pointed out, the demurrer was sustained, judgment of dismissal of Lyon's action was entered, and this appeal was taken.

We have concluded that this provision excluded from coverage by Western's policies the claim made by the State of California, and found valid by *Lyon.*

The term "bed of Clear Lake under natural conditions" *plainly and understandably,* we think, refers to the lake bottom under the high water mark. And it appears to have been uniformly so held.

"The bed of a river is 'that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water. . . .'" (*U.S. v. Chicago, M., St. P. & P. R. Co.* (1941) 312 U.S. 592, 596 [85 L.Ed. 1064, 1070, 61 S.Ct. 772].) "[T]he bed of a nonnavigable river must be deemed to be bounded by the permanent banks which confine the waters in their course at their highest level. The banks of a river are the boundaries which confine the water to its channel throughout the entire width when the stream is carrying its maximum quantity of water." (*Mammoth Gold Dredging Co. v. Forbes* (1940) 39 Cal.App.2d 739, 751 [104 P.2d 131].)

The definitions reasonably, and by authority, apply also to *lake beds. Bed* "includes the lands below ordinary high water mark. . . . Bed of navigable lake extends to high water mark." (Black's Law

Dict. (4th ed. 1968) p. 196.) "[T]he bed of a navigable lake extends to the high-water mark." (*Miami Corporation v. State* (1936) 186 La 784 [173 So. 315, 325].) "[H]igh-water mark . . . is the outer line or limit of the lake bed." (*State* ex rel. *Casson v. Thomas* (1916) 173 Iowa 408 [155 N.W. 859, 861].)

Another contention of Lyon as we understand it, is that *Lyon* gave effect to the public trust upon his upland which was in no way affected by it, and was therefore not within the exclusion of Western's policies. But a fair reading of *Lyon* reveals that its holding relates *only* to the portion of Lyon's 800 acres lying within the *bed* of Clear Lake. And, of course, Western's exclusionary clause does not relate to land which is *not* within the *bed* of Clear Lake, and concerning which the state makes no claim.

And the argument is further made by Lyon, as alleged in the complaint, that "the exclusions contained within the *title insurance policies* were not *clearly* legible. (Our italics.) But we note that at the hearing on Western's demurrer, Lyon conceded that the reference was to Western's "preliminary title report" which did not purport to be a title *insurance* policy, and upon which Lyon bases no claim. And we observe the absence of any allegation that Lyon could *not* read or understand the "not clearly legible" preliminary title report. As has been pointed out, following the sustaining of a demurrer to the complaint, Lyon declined to amend. "[W]hen a plaintiff is given the opportunity to amend his complaint and elects not to do so, strict construction of the complaint is required and it must be presumed that the plaintiff has stated as strong a case as he can." (*Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 635 [137 Cal.Rptr. 681].) We find no merit in the claim.

For the reasons we have stated it is concluded that the judgment of the superior court, in the action now before us, must be affirmed.

The judgment is affirmed.

Holmdahl, J., concurred.

RACANELLI, P. J., Concurring and Dissenting. I agree with the result reached in light of the controlling holding in *State of*

California v. Superior Court (Lyon) (1981) 29 Cal.3d 210 [172 Cal.Rptr. 696, 625 P.2d 239], under the doctrine of stare decisis, (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].) But I cannot endorse the lengthy dicta, sought to be justified in the guise of publishable criticism of an existing [Supreme Court] rule, which merely amounts in substance to no more than a reargument of the minority opinion. (See *State of California v. Superior Court (Lyon), supra,* 29 Cal.3d at pp. 233-239 (conc. and dis. opn. of Clark, J.).)

I believe that whatever heuristic value lies in the contrary position can be adequately resurrected by a footnote reference to the *Lyon* dissent appended to the dispositive portion (three to four pages at most) of the lead opinion.

A petition for a rehearing was denied April 17, 1986. Racanelli, P. J., was of the opinion that the petition should be granted. Appellants' petition for review by the Supreme Court was denied June 25, 1986.

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Nos. 86-1877, 86-1901

In The
Supreme Court of the United States
October Term, 1986

CHARLES F. FOGERTY, *et al.*,
Petitioners,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

TAHOE SHOREZONE REPRESENTATION,
Petitioner,
v.
STATE OF CALIFORNIA, *et al.*,
Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE THIRD APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether a state, having relinquished its fee title to the beds of non-tidal, navigable waters between low and high water, is prohibited by the United States Constitution from retaining a public trust interest therein.

2. Whether a substantial federal question is presented by a state court decision setting the high water mark on a navigable lake based on the lake's long-established current levels rather than some earlier, pre-regulated elevation.

3. Whether a state court's determination of high water mark on a navigable lake violates any federally-established rights of littoral owners in the absence of a showing that they have been denied any uses of the affected lands.

PARTIES

We concur with petitioners' enumeration of parties with one exception: The California Department of Fish and Game is not a party to this action.

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JURISDICTION

Petitioners in these cases seek to invoke this Court's jurisdiction under 28 United States Code section 1257(3) (1982). This Court lacks jurisdiction for at least two basic reasons.

1. Assuming petitioners' claims that the decisions of the courts below could give rise to an uncompensated "taking" in violation of the Constitution, California has not rendered a final determination of petitioners' rights that can give rise to a ripe taking claim under *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and its progeny, *MacDonald, Sommer & Frates v. Yolo County* 106 S.Ct. 2561 (1986), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S.Ct. 2378 (1987).

2. Pursuant to *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), the Court of Appeal decision at issue merely applies state property law relating to the extent of public and private interests in California's navigable waters and their underlying beds, and thus does not present a substantial federal question. (See *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The principal provision of the Constitution at issue is article III, section 2, clause 1, which provides in part:

> "The judicial Power [of the United States] shall extend to . . . Cases . . . [and] to Controversies. . . ."

The principal federal statutory provision at issue in this case is 28 United States Code section 1257 (1982), which provides in part:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ."

Also relevant is California Constitution article X, section 4 (1986), enacted in 1879 as article XV, section 2, prior to issuance of several of the grants in the instant cases, which in pertinent part provides:

> "No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

STATEMENT OF THE CASE

These cases arise out of disputes over interests of the public, and private shoreowners, involving California's largest lake, Lake Tahoe. Originally, the parties saw the matters as winner-take-all boundary disputes. California, invoking her sovereign title to the beds of navigable, non-tidal lakes and rivers, claimed a high-water boundary, and full ownership rights up to that line. The shoreowners, petitioners herein, claimed the State did not have what it claimed because, among other reasons, California Civil Code section 830, passed in 1872, relinquished the State's interest between high and low-water. Both sides have lost on these broad claims. The California court held that the State's title to lands between high and low water had been given up, but that a public trust interest had been retained. Petitioners here attack the validity of the public trust doctrine on its face. This Court is asked to aid the

shoreowners in their battle to overturn the Supreme Court of California's balanced and middle path, one which has never been applied specifically to petitioners; which draws for its authority upon common law precepts well within the realm of petitioners' expectations; and which, on its face, only prohibits petitioners from developing Lake Tahoe however they please.

1. Lake Tahoe, California's largest lake, like all of California's navigable waters, has witnessed a crushing assault of development in recent years. (See *Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 393, n. 2 (1979); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 638 F.Supp. 126, 128-129 (D. Nev. 1986), appeal docketed, No. 86-2266 (9th Cir. July 3, 1987).)

2. Petitioners are owners of littoral lands bordering the lake, and trace their title to federal grants, some made after the passage of what is now article X, section 4 of the California Constitution. Neither the petitions for certiorari, nor the record in general, disclose exactly what petitioners do with their lands, what they want to do with them, or what they need to do with them to sustain reasonable and profitable use. (But see this Court's rule 21.5 1986).) They believe generally, however, that California's retained "public trust" interest in littoral property overlaps and exceeds "reasonable land use planning through adoption of zoning laws under the police power" (petition at 9), regardless of the different nature of the doctrine and how unobtrusive it may be in a particular case.

3. In 1977, the Attorney General of California sought to establish that the State owned in full every property interest in the lands underlying Lake Tahoe up to the high water mark, based on claims to the beds of navigable,

non-tidal lakes and rivers held by California by reason of her sovereignty. After the petitioners sued under both state law and 42 United States Code section 1983 to block the State Land Commission's attempt to record such claims in the offices of county recorders throughout California, the Supreme Court of California rejected the State's claims.

In its companion decisions in *State v. Superior Court (Fogerty I)*, 29 Cal.3d 240, 247, 625 P.2d 256, 172 Cal. Rptr. 713, cert. den., 454 U.S. 865 (1981) (Petitioners' Appendix A-21) and *State v. Superior Court (Lyon)*, 29 Cal.3d 210, 625 P.2d 239, 172 Cal.Rptr. 696, cert. den., 454 U.S. 865 (1981) (Petitioners' Appendix A-35), the state court held that although California had received the beds of its navigable waters to the high-water mark on statehood in 1850, the enactment of California Civil Code section 830 in 1872 should, in light of subsequent construction, be viewed as destroying the State's fee title between high and low water. (See *Lyon, supra,* 29 Cal.3d at 225-226.) The Supreme Court of California made clear that before the State could interfere in any manner with "previously constructed docks, piers and other structures in the shorezone" (*Fogerty I, supra,* 29 Cal.3d at 249), full and adequate compensation must be paid under both state and federal law.

4. At the same time, that court ruled that Civil Code section 830 showed no intent on the part of the Legislature, with respect to lands between low and high-water, to abrogate "the trust described in *City of Berkeley v. Superior Court,* 26 Cal.3d 515, 606 P.2d 362, 162 Cal.Rptr. 327, cert. den., 449 U.S. 840 (1980)." (*Lyon, supra,* 29 Cal.3d at 226.) *City of Berkeley* relied on a long line of California decisions, e.g., *People v. California Fish Co.,* 166 Cal. 576,

138 P. 79 (1913), which in turn found persuasive support in *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892).

5. The *Lyon* and *Fogerty I* decisions, from which these cases arise, reaffirm "that these plaintiffs [along Lake Tahoe's shore] may use the shorezone for any purposes which are not incompatible with the public trust" (*Fogerty I, supra,* 29 Cal.3d at 249 (citing *City of Berkeley*)), never stating whether *any* purpose petitioners in fact entertain was barred under state law. And prior California case law, not in any way limited by *Fogerty I,* recognized many uses compatible with the trust interest, including mineral exploration (*Boone v. Kingsbury,* 206 Cal. 148, 273 P. 797 (1928), appeal dism. and cert. den., 280 U.S. 517 (1929)), and the construction of additional docks, wharves, motels, restaurants, shopping complexes, and, even, parking lots. (*Martin v. Smith,* 184 Cal.App.2d 571, 7 Cal.Rptr. 725 (1960).) Petitioners sought certiorari. This Court denied review. (*Lyon v. California,* 454 U.S. 865 (1981).)

6. To determine the high-water mark for Lake Tahoe, and hence the potential reach of the public trust doctrine, the Supreme Court of California was required to decide between petitioners' claim for "the 'last natural' water mark of the lake," and the State's claim that "the boundary should be fixed by assessing the lake in its current condition." (*Fogerty I, supra,* 29 Cal.3d at 247-248.) The state court adopted the "current level" test, noting that petitioners' expectation interests in the "natural" level had been eroded over a period of a century by the dam in the Truckee River, into which Lake Tahoe empties, now ad-

ministered by the United States pursuant to the Newlands Reclamation Project. (See *Nevada v. United States,* 463 U.S. 110 (1983).)

7. The Court of Appeal decision of which petitioners complain (*Fogerty v. State,* 187 Cal.App.3d 224, 231 Cal. Rptr. 810 (Cal. App. 1986) (*Fogerty II*) (Petitioners' Appendix A-1) simply implements the 1981 California Supreme Court ruling with respect to fixing the high-water mark, without passing on any of the uses that may be "incompatible with the public trust." The Court of Appeal declared the high-water mark to be located at the highest elevation actually reached by the lake in five sequential years, the period required for the acquisition of prescriptive rights in California. Other than the fixing of this upper boundary at 6,228.75 feet above sea level, nothing has changed since this Court denied review in 1981. No actions for injunctive relief have been brought by the Attorney General, or anyone else; motorboats still pull up to the docks at Lake Tahoe; private residents, so far as the record discloses, still exclude the public generally from their property by the usual signs, fences, hedges, and lawsuits for trespass and ejectment. Consistent with planning schemes administered by local government and the bi-state regional planning agency, as well as regulation of the U.S. Army Corps of Engineers, land use in the shorezone continues unaffected by these decisions.

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REASONS FOR DENYING THE WRIT

INTRODUCTION

Comparison of the record in this case with the factors that counsel plenary review under the certiorari jurisdiction show that this case is completely unworthy of this Court's limited resources. Even assuming that petitioners' theory of "judicial takings" may have merit in "extreme case[s]" (Petition at 16), no such "dramatic result" (*id.*) is at issue here. All the Supreme Court of California has done is tentatively recognize that lands below the current high-water mark in Lake Tahoe are *potentially* subject to judicially-fashioned trust interests, all of which may be curtailed or adapted to dovetail with private needs (and even wants). Unless this Court is ready to abandon its well-entrenched rules against consideration of broad facial challenges under the Takings Clause (rules which have been reiterated every term since review was last denied), or desires to overrule its considered opinion in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, there is no proper federal question on this record. Either the petition must be dismissed for want of a final judgment, per *San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621 (1981), or the writ should be denied under the reasoning of *MacDonald, Sommer & Frates v. Yolo County, supra,* 106 S.Ct. 2561.

Because petitioners are essentially challenging the public trust doctrine on its face, they confront an "uphill battle" on an "especially steep" slope. (*Keystone Bituminous Coal Ass'n v. DeBenedictis,* 107 S.Ct. 1232, 1247 (1987).) In such cases, this Court "properly refuses to look into the possibility that harsh results [will occur]." (*Connally v. Pension Benefit Guaranty Corp.,* 106 S.Ct.

1018, 1032 (1986) (O'Connor, J., concurring).) As this Court noted this past term, "[a] facial challenge . . . is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." (*United States v. Salerno,* 107 S.Ct. 2095, 2100 (1987).) Petitioners gain nothing by pointing out that trust interests may be implicated in over 4,000 miles of California shorezone. To use this case as a vehicle for aborting state court processes yet to be had with respect to thousands of parcels is just one more factor counseling against review. As in *Moore v. Sims,* 442 U.S. 415 (1979), here "the broader the challenge, the more evident [petitioners' ripeness problem] becomes." (*Id.,* at 428.)

Nor should it be of any concern to this Court that the instant judgment would be final if, for example, petitioners complained of a breach of procedural due process during the appellate process (*cf. Evitts v. Lucey,* 469 U.S. 387, 393 (1985)), instead of a violation of the Takings Clause arising out of the substantive decisions of the California courts. For this court has long recognized that when "further proceedings are necessary to resolve the federal question whether there has been a taking at all," this Court has no jurisdiction under 28 United States Code section 1257 (1982). (*San Diego Gas & Elec. v. San Diego, supra,* 450 U.S. at 633.) Likewise, when for purposes of its own procedure a state court has dismissed a taking claim without prejudice to its renewal following further proceedings under the finality rule, this court has treated such decisions as "final" for purposes of section 1257, but has affirmed on the ground that the answer to whether "property has been taken" is still unknown. (*MacDonald, supra,* 106 S.Ct. at 2568-2569.) These "normal delays" in litiga-

tion are simply not takings (*First English, supra,* 107 S.Ct. at 2389), and adjudication in this Court is thus precluded by "the very nature of the inquiry required by the Just Compensation Clause." (*Williamson County, supra,* 473 U.S. at 190.)

Here, California's courts, as is their right, have bifurcated the inquiry over the public trust interest in the Lake Tahoe shorezone. The first part of the litigation, recognizing that such an interest may be asserted, is over and is probably final for purposes of section 1257, just as the state court judgment in *MacDonald* was final. The second, and crucial part of the case, concerning whether and how the public trust will be applied, has yet to commence for the basic reason that no one has sought to invoke the trust. Petitioners have not been harmed any more than any landowner is harmed by the passage of a general zoning or regulatory law for which variances and exemptions can be obtained. Indeed, because no one has asserted a trust interest, petitioners are harmed a lot less. The suggestion that this Court's scarce resources are needed at this time to save petitioners from the Supreme Court of California is wholly fanciful. This case is in exactly the posture of the *MacDonald* and *Williamson County* cases as well as *United States v. Riverside Bayview Homes, Inc.,* 106 S.Ct. 455 (1986) and *Hodel v. Virginia Surface Mining and Reclamation Assn.,* 452 U.S. 264 (1981). It should for this reason be rejected for review, just as this Court has rejected similar claims that the courts of our sister states have unlawfully "taken" property by judicial decree. See *Ariyoshi v. Robinsion,* 106 S.Ct. 3269-3270, on remand, 796 F.2d 339 (9th Cir. 1986).

More fundamentally, petitioners' protests notwithstanding, granting review in this case would only plunge

this Court into a swamp that not even the most activist Justices of the *Lochner* era would have entered. No one disputes that state courts are subject to the strictures of the Fourteenth Amendment, but it would be astonishing if the rulings of the Supreme Court of California on matters as vital to California's sovereignty as the status of the beds underlying its navigable waters could provide "an appropriate vehicle for a needed declaration that the Constitution still protects real property against expropriation." (Petition at 17.) At worst, and giving our state courts *no* deference on matters of local property law, this case only reflects high-stakes litigation of the kind that often takes place in state courts, but which this Court, for many reasons, does not, and should not, review under article III and 28 United States Code section 1257(3).

1. THE STATES RECEIVED THE BEDS OF THEIR NAVIGABLE WATERS TO HIGH WATER MARK ON THEIR ADMISSION TO THE UNION. STATE LAW DETERMINES THE NATURE AND EXTENT TO WHICH THESE LANDS MAY BE SUBSEQUENTLY TRANFERRED

A. State Law Governs The Disposition Of Sovereign Lands

California acquired the beds of all her navigable waters on statehood under the constitutional equal footing doctrine. (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363.) It was clear early on that the navigable waters acquired by the states were all waters navigable in fact, and not merely tidal waters. (See *Packer v. Bird,* 137 U.S. 661, 670 (1891).) See also *Colberg v. State of California,* 67 Cal.2d 408, 423, 62 Cal. Rptr. 401, 432 P.2d 3 (1967), cert. den. 390 U.S. 949 (1968).

The initial landward boundary of these sovereign lands is fixed by federal law. (*Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363 at 376.) And that initial boundary, under federal law, is high water. (*Barney v. Keokuk,* 94 U.S. 324, 338 (1876); see Solicitor's Opinion, Department of Interior, 25 L.D. 510, 511 (1897); *Shively v. Bowlby,* 152 U.S. 1, 42-43 (1893); *Martin v. Waddell,* 41 U.S. (16 Pet) 367 (1842); *Pollard's Lessee v. Hagen,* 44 U.S. (3 How) 212 (1845); *Bowman's Devisees v. Wathen,* 2 McLean 382 (1842). The extent of public and private rights in a state's navigable waters, thereafter, is to be determined by state law. (*Barney v. Keokuk, supra,* 94 U.S. 324; *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363.) The established law in California, as in many other states (see Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L.Rev. 471 (1970); 1 Clark, Waters and Water Rights, § 36.4(A), pp. 196-197 (1967 ed.); Althaus, Public Trust Rights, U.S. Dept. of Interior (Nov. 3, 1978)), is to the effect that, absent clear and express indications of legislative intent, the courts will not construe a grant of sovereign lands as extinguishing the public easement for commerce, navigation and fisheries with which such lands are impressed. (E.g., *People v. California Fish Co., supra,* 166 Cal. 576; *Forestier v. Johnson,* 164 Cal. 24, 127 P. 156 (1912); *City of Oakland v. Oakland Water Front Co.,* 118 Cal. 160, 50 P. 277 1897).) Indeed, a State attorney general's opinion relied on by petitioners expressly states that all lands below navigable waters, whether tidal or non-tidal, are held in trust to the high-water mark. (43 Ops.Cal.Atty.Gen. 291, 294 (1964).) Accordingly, the ruling of the California Supreme Court that the 1872 Legislature had passed the State's fee title to riparian owners but had failed to terminate the

public trust interests to high-water in *Fogerty I* was wholly predictable and consistent with settled principles of state law.[1]

This rule is not peculiar to California. It was enunciated by the New Jersey court as early as 1821 in *Arnold v. Mundy*, 6 N.J.L. 1 (1821), and first recognized by this Court in *Martin v. Waddell, supra*, 41 U.S. (16 Pet) 367, 409-413. A thorough discussion of the principles underlying it was undertaken by this Court in *Illinois Central Railroad v. Illinois, supra*, 146 U.S. 387.[2] More recently the Supreme Court of Florida confirmed public rights to navigable waters irrespective of whether the beds have

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1. Indeed the court's ruling reflects a retraction of a state rule that was originally much more harsh. Early California cases held that grants of sovereign trust lands made without express legislative authorization were totally void. (E.g., *People v. Kerber*, 152 Cal. 731 (1908); *Kimball v. MacPherson*, 46 Cal. 103 (1873); *Taylor v. Underhill*, 40 Cal. 471 (1871).)

Later cases, represented by *People v. California Fish Co., supra*, 166 Cal. 576, construed such grants to be valid, but subject to a retained public trust interest. This was the holding in *Lyon* and *Fogerty I*.

2. Although *Illinois Central Railroad v. Illinois, supra*, 146 U.S. 387, described variously as the "lodestar" of public trust law (Sax, *supra*, at 489), and the "seminal case" in this field (*City of Berkeley v. Superior Court, supra*, 26 Cal.3d at 521), was approvingly cited in the *Lyon* decision for the proposition that state sovereign lands remain subject to the public trust (*State v. Superior Court (Lyon), supra*, 29 Cal.3d at 227), neither *Lyon* nor *Fogerty I* treats *Illinois Central* in any way other than what it is: an eloquent expression of the common law rule that state sovereign lands are impressed with a near-inalienable public trust, and that grants of such lands remain impressed with the public trust.

This construction makes it unnecessary to discuss petitioners' startling suggestion that the *Illinois Central* opinion was somehow reversed by *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra*, 429 U.S. 363. (*Fogerty* petition, p. 11, n. 7.) *Illinois Central* may have been a pre-Erie decision, but nonetheless it applied Illinois law. (See *Appleby v. New York*, 271 U.S. 364 (1926).)

been transferred into private ownership. (*Coastal Petroleum Co. v. American Cyanamid Co.*, 492 S.2d 339 (1986), cert. den. sub nom. *Mobil Oil Corp. v. Board of Trustees*, 107 S.Ct. 950 (1987).)

Its application to nontidal, as well as tidal, navigable waters in California is beyond question. Long before the *Lyon* and *Fogerty I* decisions, the California court held in 1884, with reference to the Sacramento and American Rivers:

> "The State holds the absolute right to all navigable waters and the soils under them, subject, of course, to any rights in them which may have been surrendered to the general Government . . . The soil she holds as trustee of a public trust for the benefit of the people; and she may, by her legislature, grant it to an individual; but she cannot grant the rights of the people to the use of the navigable waters flowing over it; these are inalienable." (*People v. Gold Run D & M Co.*, 66 Cal. 138, 151-152, 4 P. 1152, 1159 (1884).)

There is nothing unusual or unprecedented in a rule of state law that leaves public trust rights impressed on grants to private parties. For example, South Dakota and North Dakota both have statutes similar to California's Civil Code section 830. In both states, these provisions were held, as in California, to give a fee interest to upland owners down to low-water. Nevertheless, it was held that the statutes did not extinguish public trust rights:

> "While the title of the riparian owner on navigable or public waters extends to ordinary low-water mark, still his title is not absolute, except to ordinary high-water mark, and as to the intervening shore space between high and low water mark the title of the riparian owner is qualified or limited by and subject to the rights of the public." (*Anderson v. Ray*, 37 S.D. 17, 24, 156 N.W. 591, 595 (1916). Accord, *Flisrand v.*

Madison, 35 S.D. 457, 152 N.W. 796 (1915); *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937); *Sloan v. Biemiller*, 34 Ohio St. 492 (1878); *State v. Cleveland & Pittsburgh Railroad Co.*, 94 Ohio St. 61, 113 N.E. 677 (1916).)

In Montana, which has a similar statute, the rule is the same:

> "It is true that, while the abutting owner owns to the low water mark on navigable rivers, still the public have certain rights of navigation and fishery upon . . . the strip in question (between high and low water)." (*Gibson v. Kelly*, 15 Montana 417, 39 P. 517, 519 (1895).)

Other courts have also held that the trust attaches to lands between high and low-water when the sovereign bed extends only to low-water. (See, e.g., *Nedtweg v. Wallace*, 237 Mich. 14, 208 N.W. 51 (1926), affd. on rehearing, 211 N.W. 647 (1927); *Illinois Steel Co. v. Bilot*, 109 Wis. 418, 85 N.W. 402 (1901); *Miller v. Lutheran Conference and Camp Association*, 331 Pa. 241, 200 A. 646 (1938); *Attorney General v. Revere Copper*, 152 Mass. 444, 25 N.E. 605 (1890).)

B. A Riparian Boundary Is Ambulatory. State Law Controls The Effects Of Accretion, Erosion, Reliction, And Submergence

The boundary between public and private interests on navigable waters is an ambulatory one, determined by state law. (*Hardin v. Jordan*, 140 U.S. 371, 382 (1891).) State law controls the nature of the fee acquired by upland owners, whether increased or diminished by the processes of accretion, erosion, reliction, avulsion or, as here, submergence. The title to land acquired by accretion or its counterpart, submergence, has long been held to be " . . . a title acquired under operation of the law of the State, which each State determines for itself." (*St. Louis v. Rutz*, 138

U.S. 226, 250 (1891); *Barney v. Keokuk,* 94 U.S. 324, 337 (1896).)

The owner of lakefront land, like the holder of a beach house (cf. *Matcha v. Mattox,* 711 S.W.2d 95 (Texas 1986) cert. den., 107 S.Ct. 1911 (1987)), may suffer from the effects of erosion or submergence, whether natural or artificial, and may benefit from accretion. Under the common law there is no distinction as to whether changes in water boundaries were artificially or naturally caused. (*County of St. Clair v. Lovingston,* 90 U.S. (23 Wall) 46 (1874).)

Here, the courts chose to apply these common law principles, and fix the high and low water marks at the actual, established levels of Lake Tahoe with which littoral owners have been living for many years.[3] (*Fogerty I, supra,* 29 Cal.3d at 247-249.) Its opinion is both well-founded in precedent and practical.

The petitioners' apparent contention that the States' sovereign boundaries on non-tidal waters extend to the ordinary high (or low) water mark of the waterway in its "last natural condition" has no support under traditional common law principles or under California's interpretation of the common law. Under common law, the general rule is that title to the land follows changes in the shoreline, regardless of whether those changes are naturally or artificially caused. (See *County of St. Clair v. Lovingston,*

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3. Indeed, when the artificial levels of the Lake were established in the 1930's, a higher level than the one in question was approved by a poll of property owners. (Defendants' Exh. II, CT 3150; 30 Ops.Cal.Atty.Gen. 262, 266.)

supra, 90 U.S. (23 Wall.) at 68.)[4] The courts also have long held, without reference to prescriptive rules governing upland boundary disputes, that long-established water levels give rise to property rights regardless of their cause. (*City of Los Angeles v. Aitken,* 10 Cal.App.2d 460 (1935); see also *Clement v. State Reclamation Board,* 35 Cal.2d 628 (1950); *Natural Soda Prod. Co. v. City of Los Angeles,* 23 Cal.2d 193 (1943), cert. den. 321 U.S. 793 (1944): *Chowchilla Farms, Inc. v. Martin,* 219 Cal. 1 (1933); *Wilbour v. Gallagher,* 462 P.2d 232 (Wn. 1969), cert. den. 450 U.S. 878 (1970); *Diana Shooting Club v. Lamoreaux,* 114 Wis. 44, 89 N.W. 880 (1902).)[5]

The prescriptive rationale further supports this. Thus the state's boundary continues to move landward when water levels rise as a result of a dam or like condition, causing "artificial submergence." In opinions characterized by petitioners as "one old case from Arkansas and

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4. There are a few exceptions to this general rule, none of which are applicable here. Under common law, the boundary does not shift where there has been a sudden and perceptible "avulsion" or, analogously, where a lakebed has been uncovered by intentional drainage, reclamation or diversions. (E.g., F. Clark, *The Law of Surveying and Boundaries,* § 572 (4th ed. 1976); Tiffany, *Law of Real Property,* § 1222 at 1083 (3d ed. 1939).) The state court's determination that these rules did not apply to this situation is conclusive here.

In addition, California Civil Code section 1014 limits an upland owner's right to accretions to those caused by natural forces only. (*Carpenter v. City of Santa Monica,* 63 Cal.App.2d 772, 787-788, 147 P.2d 964, 971-973 (1944).) Section 1014 is inapplicable here because the artificial raising of Lake Tahoe by means of a dam has resulted in submergence of upland—not an accretion. Again, the state court's interpretation of the meaning of California law is conclusive in this Court.

5. A federal appellate court recently applied this rule to hold the Corps of Engineers had acquired jurisdiction over the artificially submerged portions of Lake Pend Oreille. (*Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986).)

another from Iowa" (*Fogerty* petn., p. 14) the Arkansas and Iowa courts held that land submerged by the erection of a dam or levee system on a navigable lake becomes the property of the State, as "trustee for the public," by virtue of prescription. (*State v. Parker,* 200 S.W. 1014, 1015-1016 (Ark. 1917); *State v. Sorenson,* 271 N.W. 234, 238-239 (Iowa 1937); see also *Village of Pewaukee v. Savoy,* 79 N.W. 436, 437 (Wis. 1899); *Diana Shooting Club v. Lamoreaux, supra,* 89 N.W. at 884; Farnham, The Law of Waters and Water Rights, § 59, p. 272 (1904 ed.).) Petitioners' characterization of the considered opinions of the highest courts of these sovereign states does not do them justice. It does, however, recognize that is neither new nor novel to adopt a rule of property based on long-established water levels. Significantly, the *Parker* case revolved around a conflict over public trust uses—one between members of the public and members of The Five Lakes Outing Club, over use of some 1,000 acres inundated by a levee in 1905. Although the club retained ownership of the underlying bed of this lake, the court held that it could not exclude the public from the waters, because the state, as trustee for the public, had acquired title by prescription. (*Id.,* 200 S.W. at 1015.)[6]

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6. The *Parker* case similarly belies petitioners' contentions that prescriptive rights must arise only if the water levels are raised by the state. In *Parker,* the dam had been built by a local levee district, not the state. (*Ibid.*) California case law is directly consistent in this regard. In *Bohn v. Albertson,* 107 Cal.App.2d 738 (1951), Frank's Tract, formerly privately owned farmland, was inundated by a breach in a delta levee. Although the owner retained title to the bed, the court held that he had no power to exclude members of the public seeking entry by boat for public trust purposes—i.e., hunting and fishing. At most he retained power to reclaim the land within a reasonable time. (*Id.,* 107 Cal.App.2d at 749; see also *Forestier v. Johnson,*

(Continued on following page)

The Washington Supreme Court used much the same reasoning in *Wilbour v. Gallagher, supra,* 462 P.2d 232, cert. den. 400 U.S. 878. In that case, the court enjoined a fill placed on land periodically submerged by operation of a dam across the outlet of Lake Chelan. The land was held in fee by the defendants. Absent the raising of water levels by the dam, the defendants' land would have been permanently dry. The court ordered defendants to remove the fill since it obstructed navigation, then discussed the effect of the dam on the lake:

> " . . . where the waters of a navigable body are periodically raised and lowered by artificial means, the artificial fluctuations should be considered the same as a natural fluctuation with the rights of the public being the same in both situations. . . . " (*Id.,* 462 P.2d at 238.)

(Accord, *Goodrich v. McMillan,* 187 N.W. 368 (Mich. 1922) [dam owner acquired prescriptive right to overflow littoral lands and maintain lake level three feet above natural level]; *Hass v. McManus,* 126 N.W. 462 (Mich. 1910) [riparian owners have right to maintenance of existing dam-regulated levels]; *Smith v. Youmans,* 70 N.W. 1115 (Wis. 1897) [artificial outlet maintained for 20 years "became the natural outlet with all its legal incidents and consequences"; dam operators acquired prescriptive right to flood plaintiff's land to new high-water level]; *Village of Pewaukee v. Savoy, supra,* 79 N.W. 436.)

(Continued from previous page)

supra, 164 Cal. 24 (public's right to fish, hunt over periodically submerged tidelands granted in fee to private owners); *Taggert v. Jaffrey,* 76 A. 123, 125 (N.H. 1910): "The stream had been changed in a manner to indicate that the alteration was permanent. There are prescriptive rights"; *State v. Malmquist,* 40 A.2d 534, 538 (Vt. 1945) (artificial, dam-established lake level "has become the natural level"; owner could not lower against objections of littoral landowners.)

Of course this theory works on behalf of upland landowners as well as the sovereign state. The appellate courts of this state have held a number of times the landowner may acquire a vested interest in a long-continued diversion of waters (*Clement v. State Reclamation Board, supra,* 35 Cal.2d 628; *Natural Soda Prod. Co. v. City of Los Angeles, supra,* 23 Cal.2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18) and may recover damages if the level of a lake is lowered against his long-established expectations. (*City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d at 472, cited in *Fogerty I, supra,* 29 Cal.3d at 248, fn. 5.)

C. Petitioners Had Ample Remedies Under State Law For Any Rights Lost By The Raising Of Dam Levels

Littoral owners whose lands are affected by an artificial raising or lowering of waters have ample remedies under state law. (*City of Los Angeles v. Aitkin, supra,* 10 Cal.App.2d 460.) However, if they fail to assert them in a timely manner, both state and private owners may become entitled to rely on the established artificial levels. (*Natural Soda Products v. City of Los Angeles, supra,* 23 Cal.2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18, cited in *Fogerty I, supra,* 29 Cal.3d at 248.)[7]

As petitioner Tahoe Shorezone Representation concedes, the right to object to the elevated waters of the lake

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7. See also 43 Ops.Cal.Atty.Gen. 291, 298 (1964) pointing out that "an artificially caused change in the water line of a lake or stream may come to be regarded as permanent," although the opinion goes on to state:

> "[I]t is possible that the artificial change would not result in a boundary change . . . if further changes in the artificially influenced waters could be enjoined, the practical effect would be to change the boundaries." (*Id.,* at 298-299.)

and the corresponding public uses up to the elevation of 6229.1 has long since been lost (TSR petition, 18-19). The Attorney General's opinion cited by petitioner bears this out in discussing the effect of the Truckee River Decree on rights of the littoral owners:

> "In our opinion, the right to an injunction is also now barred, even assuming that the acts of the federal officials in flooding littoral lands through operation of the dam, without the United States first having acquired rights to do so by condemnation, could have been enjoined when the flooding first occurred [citations omitted]. Since the littoral landowners have failed for more than 40 years to obtain injunctive relief, the equitable doctrine of laches would seem to bar the granting of such relief now. Irrespective of the applicability of any statute of limitations on such an action, it is a familiar principle of equity that 'unless a litigant can show that he acted with reasonable diligence in the assertion of his equitable rights, a court of equity will turn a deaf ear to his plea.' (*Williams v. Stilwell* (1933), 217 Cal. 487, 490; *Gillons v. Shell Co. of California* (9th Cir. 1936), 86 F.2d 600, 609-619)." (30 Ops.Cal.Atty.Gen. 262, 272 (1957).)

The same reasoning obviously applies as between littoral landowners and the State of California.

Obviously, littoral owners whose lands are affected by an artificial raising or lowering of waters have ample remedies under state law. They may seek injunctive relief, or they may seek compensation. (*City of Los Angeles v. Aitken, supra,* 10 Cal.App.2d 460.) However, if they fail to do so in a timely manner, both state and private owners may become entitled to rely on the established artificial levels. (*Natural Soda Products Co. v. City of Los Angeles, supra,* 23 Cal. 2d at 197; *Chowchilla Farms, Inc. v. Martin, supra,* 219 Cal. at 18.)

The California court has accurately concluded, therefore, that the condition of the lake as it has existed since

the construction of a dam in 1870 should be utilized in determining the lake's high-water mark.[8]

2. THE ACQUISITION OF SOVEREIGN RIGHTS UNDER STATE LAW GOVERNING AMBULATORY WATER BOUNDARIES IS NOT RESTRICTED TO THE LOCATION OF THOSE BOUNDARIES IN 1850

Petitioners' contention that the trust cannot exist on lands to which the state did not acquire title at statehood fails to comprehend the concept that riparian boundaries are ambulatory in nature, and can rise or fall with water levels. Furthermore, this proposition was expressly disapproved as a matter of state law in *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal.3d 288, 299, fn. 11 (1982). The subsequent reversal of that case by this Court on other grounds in *Summa Corp. v. California* ex rel. *State Lands Comm.,* 466 U.S. 198 (1983) did not affect that holding.

In fact, this Court in *Summa* recognized the nature and extent of the state's public trust doctrine and indicated that in circumstances where the 1851 federal validating act controlling the transfer in question was not applicable, as in the instant case, a different result would follow:

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8. The court pointed out in *Fogerty I* that adoption of this method of fixing boundaries will make clarification of both private and public rights considerably easier in a state where virtually all of the lakes and rivers have been artificially regulated since the nineteenth century. It is no rebuttal to this application of state law to contend, as do petitioners Fogerty et al., that a 1957 study purported to fix a natural high waterline. (Petn., pp. 3-4, n. 1.) That study did not in fact or even purport to fix or establish in any way a natural high-water line of Lake Tahoe. It was a comprehensive water supply study of the lake which included an estimate of what the levels might have been after 1900 in the absence of the dam constructed at the lake's outlet (TR 3367 et seq.). Moreover, even the petitioners did not urge the elevation they suggest here in the proceedings below.

"The Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution. *Pollard's Lessee v. Hagan,* 3 How. 212 (1845). Thus, an ordinary federal patent purporting to convey tidelands located within a State to a private individual is invalid, since the United States holds such tidelands only in trust for the State. *Borax, Ltd. v. Los Angeles,* 296 U.S. 10, 15-16 (1935). But the Court in *Borax* recognized that a different result would follow if the private lands had been patented under the 1851 Act. *Id.,* at 19. Patents confirmed under the authority of the 1851 Act were issued 'pursuant to the authority reserved to the United States to enable it to discharge its international duty with respect to land which, although tideland, had not passed to the State.' *Id.* at 21. See also *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 375 (1977); *Knight v. United States Land Assn.,* 142 U.S. 161 (1891)." (466 U.S. at 205.)

Petitioners look to *Brewer-Elliott Oil and Gas Co. v. United States,* 260 U.S. 77 (1922) to support their position that the public trust easement cannot move up the lakeshore as the waters rise. (*Fogerty,* petn. at p. 15.) More to the point, this Court stated in the next sentence to that quoted by petitioners:

"It is true that, where the United States has not in any way provided otherwise, the ordinary incidents attaching to a title traced to a patent of the United States under the public land laws may be determined according to local rules; but this is subject to the qualification that the local rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee. *Thus the right of the riparian owner under such grant may be limited by the law of the State either to high or low water mark or extended to the middle of the stream. Packer v. Bird,* 137 U.S. 661, 669." (*Brewer-Elliot Oil and Gas Co. v. United States, supra,* 260 U.S. at 88; emphasis added.)

A water boundary is an ambulatory boundary. Its movement, as between the state and private upland owners, is determined by state law, and has been ever since *Martin v. Waddell, supra,* 41 U.S. (16 Pet.) 367, if not before. It does not present a federal question. (E.g., *Matcha v. Mattox, supra,* 711 S.W.2d 95 (Texas, 1986), cert. den., 107 S.Ct. 1911.)

3. PETITIONERS, HAVING FAILED TO ALLEGE ANY DENIAL OF ECONOMIC USE OF THEIR PROPERTY, DO NOT RAISE A FEDERAL QUESTION COGNIZABLE BY THIS COURT.

Petitioners have urged that the existence of a public trust on privately held property between high and low-water imposes invalid restrictions on their use of such property. Assuming for purposes of argument, that a state court's declaration of common law can effect a taking,[9] their complaint fails to assert such a claim.

The possible exercise of the public trust on navigable waters is no more a taking than is the proper exercise of the navigational servitude. It is, " . . . not an invasion of any private property rights in the stream or the lands underlying it, for the damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." (*United States v. Rands,* 389 U.S. 121, 123 (1967); accord *United States v. Cherokee Nation of Oklahoma,* 107 S.Ct. 1487, 94 L.Ed.2d 704 (1987).)

Setting public trust considerations aside, the interest of a littoral owner between high and low-water is a quali-

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9. See *Gt. Northern Ry. v. Sunburst Co.,* 287 U.S. 358, 364-365 (1932); *Tidal Oil Co. v. Flanagan,* 263 U.S. 444, 450 (1924).

fied one to say the least. It is subject both to state and federal navigational servitudes to high-water. (See *City of Berkeley v. Superior Court, supra,* 26 Cal.3d at 545, cert. den. 449 U.S. 840; *Colberg v. State of California, supra,* 67 Cal.2d 408, 416, cert. den. 390 U.S. 949; *United States v. Cherokee Nation of Oklahoma, supra,* 107 S.Ct. 1487; *United States v. Rands, supra,* 389 U.S. 121, 123; *United States v. Willow River Co.,* 324 U.S. 499, 509 (1944); see also *Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970).)[10] Moreover, consistent with the California rule, the federal navigational servitude extends to the artificially-raised high-water mark.[11] (*Swanson v. United States, supra,* 789 F.2d 1368.) And at Lake Tahoe the littoral interest is subject to periodic inundation up to an elevation above that set by the California Court of Appeal whenever the federally-appointed watermaster deems it appropriate. (See *Fogerty II, supra,* 187 Cal.App.3d at 224, 231, 235; see also 30 Ops.Cal.Atty.Gen. 262 (1957).)

The existence of a public trust on such lands does not deprive petitioners of economic use of the lands between high and low-water. Upland owners have taken a fee subject to the retained public trust interest. The purchaser of lands subject to the public trust ". . . may use the prop-

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10. The New Jersey Supreme Court has held that even privately owned dry sand beaches controlled by a quasi-public entity are subject to public right of access as reasonably necessary. (*Matthews v. Bay Head Imp. Assn.,* 471 A.2d 355 (N.J. 1984), cert. den. 469 U.S. 821.)

11. A federal district court recently affirmed applicability of the Corps of Engineers' jurisdiction over artificially-created wetlands under the Clean Water Act, as well, holding such lands could be "navigable waters of the United States." (*United States v. Akers,* 651 F.Supp. 320 (E.D. Cal. 1987).)

erty as he sees fit, subject to the power of the state to abate any nuisance he may create thereon, and to remove any purpresture he may erect thereon." Furthermore, where improvements have been constructed on such lands the state may not exercise the trust without compensating the patentee. (*People v. California Fish Co., supra,* 166 Cal. at 599.)

Uses consistent with the public trust have been held, under prior decisions of the California courts, to include clearly economic and valuable ones, including mineral exploration (*Boone v. Kingsbury, supra,* 206 Cal. at 181-184) and the construction of docks, wharves, motels, restaurants, shopping complexes and parking areas. (*Martin v. Smith, supra,* 184 Cal.App.2d 571.) Waterfront docks, resorts and buildings line the shores of San Francisco Bay, Los Angeles and San Diego harbors in mute reproach to petitioners' dismal characterization of trust restraints. Petitioners have been unable to cite a single instance in which littoral landowners have been denied use of trust land held by them in fee, nor have they found an instance in which the state has exercised the trust and re-entered for the purpose of furthering the trust.[12]

Petitioners cannot be heard to complain of being precluded from activities in which they have not even attempted to engage. They are entirely free to pursue their reasonable investment expectations by developing plans and going through the same processes any other landowners must pursue. Indeed, the existence of the public

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12. Even if it did so, of course, it would be required to compensate the owner for any lawful improvements. (*Illinois Central Railroad Co. v. Illinois, supra,* 146 U.S. at 455; *People v. California Fish Co., supra,* 166 Cal. at 599; California Public Resources Code section 6312.)

trust, while possibly inhibitive of fill or the construction of incompatible improvements, does not, absent an implementing statute or ordinance, even require petitioners to obtain the affirmative approval of anyone. (*Lyon, supra,* 29 Cal.3d at 232; *Fogerty I, supra,* 29 Cal.3d at 249.)

Indeed, before reaching some hypothetical public trust barrier, would-be developers of Lake Tahoe's shoreline must first seek the approvals of the U.S. Army Corps of Engineers and the regional and local planning agencies. The record indicates that the applicable land use regulations of these agencies would not permit any development in the shorezone (to an elevation above the high water mark in question) except for piers and other navigational facilities which are also deemed consistent with the public trust (TR 2708, 2719 et seq.; 2740 et seq.; 3030 et seq.; 3148).

Thus, petitioners' allegations that the mere existence of the public trust along the shores of Lake Tahoe below the high-water mark amounts to an unconstitutional taking is unsupported by any facts. They do not present this Court with a basis to judge whether their interests have been adversely affected, reasonably or not. Clearly such bald allegations are not ripe for consideration. (See *MacDonald Sommer & Frates v. Yolo County, supra,* 106 S.Ct. 2561; *Williamson County Regional Planning Commission v. Hamilton Bank, supra,* 473 U.S. 172.)[13]

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13. The question of the appropriateness of the damages remedy for regulations which deny a landowner all use of his land as recently considered and explained by this Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra,* 107 S.Ct. 2378, has not been, and cannot be, raised in this case. Nor would it be appropriate in any

(Continued on following page)

This case was not ripe for review when petitioners asked this court to review *Fogerty I* in 1981 (cert. den., 454 U.S. 865). It is no more ready now that an intermediate appellate court has determined the location of Lake Tahoe's high-water mark at its current level. (See *Ariyoshi v. Robinson, supra,* 106 S.Ct. 3269.)

CONCLUSION

In 1893 this Court observed that the states are free to adopt their own rules of property, and that generalizations should be undertaken with great caution. (*Shively v. Bowlby, supra,* 152 U.S. at 26.)

As then-Justice Rehnquist stated in *Oregon* ex rel. *State Land Board v. Corvallis Sand & Gravel Co., supra,* 429 U.S. 363:

> "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.' *Davies Warehouse v. Bowles,* 321 U.S. 144, 155 (1944). This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of *Swift v. Tyson,* 16 Pet. 1 (1842), an exception was carved out for the local law of real property. *Id.,* at 18. See *United States v. Little Lake Misere Land Co.,* 412 U.S. 580, 591 (1973).

(Continued from previous page)

event absent any showing of state implementation of the challenged decision which denied petitioners "all use" of their property. (*Id.,* at 2388-2389.)

"This principle applies to the banks and shores of waterways, and we have consistently so held." (*Id.*, at 378-379.)

Long ago, this Court wisely held that:

"[I]t is for the state court in cases such as this to define rights in land located within the state, and the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determined to be nonexistent." (*Fox River Co. v. R.R. Comm.*, 274 U.S. 651, 657 (1927).)

For these reasons, the petitions for a writ of certiorari should be denied.

DATED: July, 1987.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

TAHOE SHOREZONE REPRESENTATION,
Petitioner,

VS.

STATE OF CALIFORNIA, et al.,
Respondents.

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT ON QUESTIONS PRESENTED

The State's Brief in Opposition appears to furnish little, if any, assistance to this Court in determining whether the issues presented by the Petitioners and discussed by Amicus are matters of such significant national and constitutional concern as to justify review by this Court. In an apparent effort to avoid a legitimate discussion of the real issues involved, the State has simply recharacterized the questions presented by the petitions. (See also, Petition No. 86-1877.) Having redefined the questions, the State then responds to the questions thus created and ignores the questions that actually result from the decisions below.

To illustrate, the State, in its Questions Presented, No. 1, suggests that one of the issues is whether the United States Constitution prohibits a state from "*retaining*" a public trust interest in conveyed sovereign lands. No one in this litigation has made such an argument. Rather, Petitioners simply contend that since the State retained no interest in the land between the ordinary high and low water marks when the California Legislature, in 1872, confirmed the dividing line at the ordinary low water mark, it cannot now constitutionally assert such a claim.[1] (Petitioners further contend that the State would now be barred even if the land involved had been part of the bed of Lake Tahoe at statehood which, of course, it was not.)

In Questions Presented, No. 2, the issue is characterized by the State as one of whether a "substantial federal question" is presented when a state court sets a high water mark on a navigable lake. No one representing Petitioners has ever argued that a state court did not have the power, under the proper

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[1] As the California Court of Appeal below recognized:
"The state first asserted claim to the lands at Lake Tahoe in 1977, whereupon this litigation was promptly filed. (*Fogerty*, supra, at p. 243.) Before the state's assertion of its claim in 1977, the owners had no reason to believe the figure of 6229.1 feet was anything more than a limitation on filling the reservoir. They had no cause to suspect it could have further significance as a property boundary for purposes of the public trust doctrine." (App. A at A-12.)

circumstances and in accordance with established law, to determine the location of water marks on the shores of bodies of water, whether they be navigable or non-navigable. The substantial federal question here and the real issue is whether a state court is constitutionally prohibited from unpredictably and without precedent reversing well-established property law in setting those marks where the court's decision has the effect of taking property rights from private owners without compensation and transferring those rights to the State. The further substantial federal question is whether constitutional prohibitions against takings are overcome by *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), or the Equal Footing Doctrine.

In the State's Questions Presented, No. 3, the attempt is made to convert the state court's imposition of an extremely onerous easement onto the private shoreline land involved into a land use regulation case. This unique approach is seemingly based on its unsupported allegations that no government agency has yet taken action to enforce the public's rights under the newly-created public trust easement. The State then contends that the petitions are premature since the issue will not be ripe until each owner proves that the public has, indeed, invaded the land involved. Until now no one has even suggested in this litigation, or generally so far as Petitioner knows, that the taking of an easement by a public agency is permissible without payment so long as the easement is not used. Nor can it legitimately be argued that no payment is required for the appropriation of an easement so long as there is some value left in the encumbered land. The bottom line is that this is not a land use regulation case—the attempt by the State to characterize the taking of an easement as a land use regulation case is novel but inappropriate.

The manner in which the State has attempted to recharacterize the questions presented to this Court is but another example of the zeal and determination afflicting some state agencies and courts in their concerted effort to convert private property to public use without compensation in total disregard of both federal and state constitutional protections. How easy it seems to be for public attorneys and state judges to get caught up on the spirit of "protecting" the shorelines of the nation's waterways from alleged

abuses. How easy to fan the flames of resentment toward those who in good faith acquired lake or river front properties with the *reasonable expectation* that well-established rights in those properties would be respected by both the executive and judicial branches of the state.

The "effective judicial intervention" that is being taught in so many law schools and is the subject of so many "scholarly" articles in regard to how government can acquire private property without payment needs to be turned into "effective judicial intervention" in support of the constitutional rights of private property owners. (See TSR's Petition, p. 18-20.) The granting of the petitions and a full hearing before this Court would appear to be a way to insure that the "tyranny of the majority" will not be used against other shoreline owners throughout the nation to also appropriate their property without compensation.

There appear to be several areas in the Brief in Opposition that justify a limited reply. Ripeness, the *Illinois Central* decision, and matters relating to navigable waters are discussed below.

RIPENESS WAS SATISFIED WHEN THE CALIFORNIA COURT OF APPEAL SET THE LANDWARD BOUNDARY OF THE PUBLIC TRUST EASEMENT AT ELEVATION 6228.75

The transfer of private property interests by the State to the State is now complete. The public trust easement was precisely located on the shoreline of Lake Tahoe when the California Court of Appeal ruled that it encumbered the shoreline up to elevation 6228.75 feet, Lake Tahoe datum. There is no question that the normal, compensated acquisition of an easement by a public agency in private property occurs with the transfer of title. That transfer occurred here by judicial decision. While recognizing that the State made no claim until 1977, and, indeed, had actually disavowed any such claim, that decision, nevertheless, held that shoreline properties are now encumbered with the public trust easement and are "held for the benefit of the public for purposes

of commerce, navigation, fishing, recreation and preservation of the land in its natural state." (See App. A at A-7.)[2]

The State, in its opposition to TSR's 1981 Petition for Certiorari, impliedly recognized that, although the matter was not then ripe for review it would be, once the public trust easement limits were located on the shoreline. The State based its ripeness arguement then on the fact that "issues respecting high and low water lines remained to be tried on remand to the state trial court". (See TSR Petition, p. 8.) This is exactly what has occurred. The California Court of Appeal, in Fogerty II, has precisely defined the location of the public trust easement—nothing remains to be done. Whether or not the State or the public exercises the acquired rights under the public trust easement in any particular way does not change the fact that the easement exists on the private owners' shoreline property and was placed there in November 1986 by the California Court of Appeal.

The State is now attempting to convert this litigation into a land use regulation case. (See, e.g., Brief in Opposition, p. 26.) This is obviously an effort to bolster its ripeness argument. There is no merit to this approach since this is clearly a case involving a physical occupation of the property. It also ignores the fact that the Court of Appeal below held that the State of California had acquired its public trust easement "pursuant to the doctrine of prescription". (See App. A at A-7.) Additionally, as observed in *Summa Corp. v. Calif. ex rel. Lands Comm'n.*, 466 U.S. 198 (1984), the public trust leaves the landowner with little more that a "naked fee", further pointing out that any private use "remains subject to the right of the State or *any member of the public* to assert the State's public trust easement." (*Id.* at 205.) (See also *Marks v. Whitney*, 6 Cal.3d 251, 261 (1971).) In other words, the public trust easement is in place with no further action being required.

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[2] It is not relevant nor is it comforting to Lake Tahoe shoreline owners to be told that the State of California has allowed the area below the ordinary high tide mark at the Pacific Ocean to be the subject of mineral exploration. (See Brief in Opposition, p. 25.)

Nollan v. California Coastal Comm'n., No. 86-133 (June 26, 1987), makes it clear that the appropriation of an easement involves a "permanent physical occupation" rather than a land use regulation:

> "We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." (Slip op. at 6.)

With the decision of the California Court of Appeal, the shoreline owners lost "the right to exclude others". This right has been described over and over as "one of the most essential sticks in the bundle of rights that are commonly characterized as property." (*Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).) It is difficult to imagine how the issue presented by these petitions could be more ripe for review.

THE CALIFORNIA COURT DECISIONS ARE BASED ON THE ILLINOIS CENTRAL DECISION EVEN THOUGH THAT RELIANCE IS MISPLACED

As indicated in TSR's petition (see p. 5), the California Attorney General advised the California State Lands Commission to claim "sovereign ownership" of the shoreline of all California lakes and rivers up to the "ordinary high water mark". The Attorney General's fallback position was that in the absence of any law to support that claim a public trust easement should be claimed in the same land under the authority of this Court's decision in *Illinois Central*. As described in TSR's petition herein, the California Supreme Court did in fact rely upon *Illinois Central* to support its sudden, startling, unpredictable and unprecedented reversal of well-established California property law relating to shoreline ownership. The reliance on and extreme importance of *Illinois Central* to the California courts in the rulings is perhaps nowhere better demonstrated than by the statement from *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983), where the California court ruled that the State's power under the *Illinois Central* case "extends to the revocation of previously granted rights or to the enforcement of

the trust against lands long thought free of the trust" and the further statement that the doctrine defeats "the claim that the establishment of the public trust constitutes a taking for which compensation was required." (*Id.* at 440.)

In answer to Petitioner's plea to this Court that it grant the petitions and set the record straight on the meaning and impact upon state courts of *Illinois Central*, the State has seemingly retreated from reliance on *Illinois Central* and is now attempting to downplay its significance to the California Supreme Court decisions. When the State commenced its claims for the shoreline property, the *Illinois Central* decision was its centerpiece since there was no California law supporting its claim. The California Supreme Court adopted the proposition that *Illinois Central* required the rulings that were eventually made. However, it is somewhat ironic that now, before this Court, and realizing that *Illinois Central* does not support the State's position at all, the State is now suggesting that *Illinois Central* was simply "persuasive support" (See Brief in Opposition, p. 5) and was "approvingly cited in the *Lyon* decision". (See Brief in Opposition, p. 12.)

The State is now frantically attempting to create the impression that pre-existing *state* property law supports its position and that there has been no change in state property law at all. Perhaps the best evidence that the State's present position is unsupported by California law is found in the unrefuted dissents in *State of California v. Superior Court* (*Lyon*), 29 Cal.3d 210 (1981) and *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal.3d 288 (1982), and the critical analysis in *Lyon v. Western Title Ins. Co.*, 178 Cal.App.3d 1191 (1986). These discussions clearly demonstrate that what the California Supreme Court ruled and what the California Court of Appeal implemented was a drastic reversal of California law, without precedent, and contrary to the reasonable expectations of any landowner on the shores of Lake Tahoe.

No matter what the State now says, the fact remains that the two California courts erroneously relied on *Illinois Central* to transfer private property into public ownership and used *Illinois Central* to justify a departure from previously established law.

THIS "HIGH-STAKES" LITIGATION INVOLVES LAND—NOT WATER!

One of the drastic results of the present posture of this 11-year old "high-stakes"[3] litigation is the taking away of the right of Lake Tahoe shoreline owners to "exclude others" from the land exposed as the water recedes between the high and low water marks on their lakefront property.

In its Brief in Opposition, the State quotes and cites California Constitution Article X, section 4, which relates to the right of the public in the navigable waters of the state. (See Brief in Opposition, p. 2 and 3.) Since the State stops with a mere reference to the section in both instances, one must wonder as to its purpose in citing the section. Perhaps it is to create the erroneous impression that a public right in and to navigable waters includes a right to recreationally use land exposed when the periodic flooding of the shoreline recedes each year.

Although the decision is not mentioned by the State in its Brief in Opposition, if the creation of such an impression be its goal, it should suffice to say that a similar argument was recently rejected by this Court in *Nollan, supra*, slip op. at 7. It seems reasonable to conclude that Justice Brennan would also reject the notion that Article X, section 4, includes not only access to navigable waters but also includes public use of that same land for "picnicking, hunting, fishing, hiking, birdwatching and nature study" in addition to the "preservation of the land in its natural state."

However, whatever be the State's motive in the reference, the Petitioner has never contended that the public did not have a right to exercise what is probably best described as a state navigational servitude in the navigable waters of the state, wherever they may be. That servitude was early recognized in *Bohn v. Albertson*, 107

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[3] Although the State attempts to minimize the burden of California's public trust easement, its real but unexpressed belief as to the extent the public trust easement actually interferes with the owners' right of use and privacy is rather clearly revealed when the State refers to this as "high-stakes litigation". (See Brief in Opposition, p. 10.) Obviously, Petitioner does not quarrel with the State's characterization.

Cal.App.2d 738 (1951). (Cited by the State in footnote 6 at page 17 of its Brief in Opposition.) The relevant point in the *Bohn* decision here, however, is that the owner retained title to the bed and when the waters receded had the right to exclude members of the public from the exposed land. If the State is attributing some implication to this language in the California Constitution that the public has the right to occupy the land of shoreline owners as an adjunct to the use of navigable waters, it should be noted that it has never been so held by any California cases of which Petitioner has knowledge nor has the State cited any such authority. Nor would such a decision be appropriate. The use of navigable waters by the public has a remarkably different impact on the shoreline owner than if the occupants of the craft using those adjacent waters disembark and use the shoreline owner's land for purposes of "picnicking, hunting, fishing, hiking, birdwatching and nature study" as the public has the right to do under the language of *Fogerty I*. The reasonable expectations of the owners most likely included the former, but certainly never the latter.

The only California case cited by the State in support of the implication that any public trust doctrine, even of the unexpanded variety, had ever before applied to non-tidal navigable waters is *People v. Gold Run D & M Co.*, 66 Cal. 138, 151-152 (1884). However, contrary to the State's attempted use of that decision, that early California Supreme Court implicitly rejected the proposition that after the alienation of the "soil" underlying the bed of a navigable river the public retained any rights in the soil itself. The court observed that the state may "by her Legislature, grant it [the soil] to an individual". The court then clearly states that the *inalienable* rights are those relating to the "use of the navigable waters flowing over it" [not the underlying soil].[4] Thus, rather than refute Petitioner's contentions, the only California

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[4] The quotation set forth in the State's Brief in Opposition is followed by a further indication that the Court's concern is with the navigable waters—not the soil: "Any grant of the soil, therefore, would be subject to the paramount rights of the people to the use of the highway." (*Id.* at 152.)

authority cited by the State that has remotely considered the question favors the shoreline owners here.

The State continues its search for a valid and relevant legal theory to support what the California courts have done to the shoreline owners. Before the California Court of Appeal the State argued that the "agreed boundary" doctrine established the landward boundary of the public trust easement. (See TSR Petition, p. 9.) The court of appeal rejected this argument and instead ruled that the *Illinois Central* public trust easement had been acquired by the State by prescription, during the years 1967 through 1971, and precisely fixed its landward boundary at elevation 6228.75 feet. The State now attempts to suggest that somehow the rules relating to ambulatory water boundaries should come into play, apparently recognizing that the essential elements of the doctrine of prescription are missing, as pointed out earlier in the petitions and the amicus brief filed herein. The State's present dilemma as to which theory to now adopt is understandable since one of the essential elements of the doctrine of prescription, that is, hostile use or claim by the claimant, is missing here. No use at all has been shown and no such claim was made by the State until 1977—which, incredibly, was some five years after the public trust easement had been acquired by prescription, according to the court below.

Furthermore, as recently as 1964, the California Attorney General advised, in a published opinion, that the boundaries of a non-tidal navigable lake are "to be established according to its last *natural* elevation, not affected by artificial influence, such as dams or locks." (Emphasis added.) (See 43 Ops. Cal.Atty.Gen. 291, 297 (1964).)

CONCLUSION

The public trust easement created and imposed by the California courts has resulted in the transfer of essential property interests of the shoreline owners to the State. The courts have said that any member of the public has a right to enforce it. The court rulings have destroyed the reasonable expectations of the shoreline owners.

As observed by Justice Brennan in *Nollan, supra*:

> "Where a private land owner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose." (*Id.*, Brennan, J., dissenting, slip op. at 7.)

There is no serious question but that shoreline owners' due process rights were violated by the imposition of a prescriptive easement across their lands and that the judgment below, if allowed to stand, will result in an uncompensated taking.[5]

None of the State's or California courts' theories which have imposed this onerous public trust easement on the shorelines of California lakes and rivers can withstand even superficial constitutional scrutiny. However, unless this Court acts, the shoreline owners of California will have been deprived of valuable and essential property rights by the State in violation of the Constitution.

Respectfully submitted,

WILLIAM T. CHIDLAW
Attorney for Petitioner
Tahoe Shorezone Representation

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[5] Since this petition does involve the judicial taking issue, Petitioner cannot let go unchallenged the representation by the State that this Court in *Ariyoshi v. Robinson,* 106 S.Ct. 3269-3270, on remand, 796 F.2d 339 (9th Cir. 1986), "rejected similar claims that the courts of our sister states have unlawfully 'taken' property by judicial decree". (See Brief in Opposition, p. 9.) Unless Petitioner is badly mistaken, this Court simply remanded *Ariyoshi* back to the lower courts for further consideration in light of *Williamson County Regional Planning Comm'n. v. Hamilton Bank*, 473 U.S. 172 (1985), and did not rule on the substantive issue in that case, i.e., whether a state court violates the constitutional provision against taking property without just compensation when it unpredictably and without precedent reverses long established property law.

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Nos. 86-1877 & 86-1901

In The

Supreme Court of the United States

October Term, 1986

CHARLES F. FOGERTY, *et al.*,

Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,

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TAHOE SHOREZONE REPRESENTATION,

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STATE OF CALIFORNIA, *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the Court of Appeal of the State of California for the Third Appellate District

BRIEF OF AMICUS CURIAE, PACIFIC LEGAL FOUNDATION, IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petitioners, Charles F. Fogerty, *et al.*, and Tahoe Shorezone Representation. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the clerk.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. The PLF Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of an amicus curiae brief in this matter.

Amicus seeks here to augment the argument in the Petitions for Writ of Certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

On March 30, 1987, PLF argued the case of *Nollan v. California Coastal Commission,* No. 86-133, *juris. noted,* October 20, 1986. As in *Nollan,* this case reveals once again the incessant effort by the State of California to extend a public right of access and use over private waterfront property. *Nollan* involved an attempt to exact such property by a "required dedication" imposed as a condition to obtaining a building permit. Here the mechanism is the employment of an expansive "public trust" easement concept. The intended result, however, is the same—the acquisition of private property for public use without the payment of compensation. In the instant situation, however, no triggering action by the property owners was involved. No requests for development permits were

looked to for justification. Here, the result is simply accomplished by judicial fiat.

Amicus believes the opinion below poses a serious threat to the integrity of the individual right of property by violating constitutional prohibitions against the taking of property without compensation as well as due process guarantees. The result also violates fundamental notions of fairness and equity.

STATEMENT OF THE CASE

The opinion below[1] involves private property, much of it residential, fronting on Lake Tahoe. Historically, titles were derived from two separate sources which must be evaluated separately in terms of the legal issues presented.

First, there are those lands which were below natural high water mark at the time of California's admission to the Union on September 9, 1850. These were lands which the state, by virtue of its sovereignty, was entitled to either claim or not claim, as it might choose. California adopted the rule that lands fronting on navigable nontidal, *i.e.*, inland, waters extended to low water mark, a rule which since 1872 has been embraced in California Civil Code § 830. The California Supreme Court in *Lyon*, 29 Cal. 3d at 225, held that the effect of Section 830 was to

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[1] In referring to the opinion below, and the interim decisions leading up to the final judgment, this amicus will adopt the references used by petitioner, Tahoe Shorezone Representation. Thus, the interim opinion by the California Supreme Court in *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240 (1981), will be referred to as *Fogerty I;* the companion case in *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210 (1981), will be referred to as *Lyon;* and the opinion of the Court of Appeal in *Fogerty v. State of California*, 187 Cal. App. 3d 224 (1986), will be referred to as *Fogerty II*.

grant to private persons "title to the beds of navigable bodies to low water mark."

Despite recognition that such lands were long ago conveyed into private ownership, the California Supreme Court in *Fogerty I* and *Lyon* resurrected a state claim by application of a "public trust" concept. The result is that the State of California, by the judgment below, has reasserted an interest so broad that for all practical purposes it swallows up the fee long since conveyed away. Under this approach, public rights between high and low water mark are not limited to navigational or water related uses. When water levels are low, it is declared that such lands, *even though dry,* nevertheless are open to public entry for nonwater related uses, including picnicking, hunting, and hiking. *Fogerty I,* 29 Cal. 3d at 245.[2] The doctrine also requires "preservation of the land in its natural state." *Fogerty II,* 187 Cal. App. 3d at 233.

Secondly, there are those lands upland of the natural high water mark—fast lands to which the state could never have asserted a claim by virtue of its sovereignty and which long ago were patented into private ownership by the federal government. The opinion below holds that even this type of land is subject to California's public trust doctrine if such land has been subject to periodic flooding due to the construction and operation of a dam by others. All that is required is the passage of time, and unsuspecting property owners will awaken one day to find that their land, during those times when it is not flooded, is nevertheless open to public entry for all the uses embraced by

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[2] In *Fogerty II,* 187 Cal. App. 3d at 234, this became picnicking, hunting, and *biking.* Although possibly a typographical error explains the reason for the change, it makes little difference—California's public trust doctrine is broad enough to embrace both hiking and biking.

California's public trust doctrine. Moreover, the owners' right to use their property, in a manner not inconsistent with any flowage easement acquired by the dam operator, will forever be severely restricted.

The dam at Lake Tahoe is operated by the federal government which controls the flow of water at the lake's only outlet into the Truckee River. The lake is used by the federal government as a reservoir. The dam gates can raise water levels only by about six feet. However, in many areas of gently sloping land, a considerable amount of property is periodically subject to flooding.

The opinion below held that the public right of use arose under a theory of prescription based upon the five consecutive years of *highest water,* backed up by the federal government's dam, since 1944. These were the years 1967 through 1971. *Fogerty II,* 187 Cal. App. 3d at 240. Public rights were thus extended to an elevation of 6228.75 feet above sea level. *Id.*

The effect of the judgment below has been to open these private uplands to the general public for use during those times when the lake's level retreats toward its natural level. Inasmuch as the federal government uses the lake as a reservoir, water levels are frequently below the highest levels achieved in 1967 through 1971.

Many of the properties affected are developed as residential homesites. Although homeowners undoubtedly consider boating and fishing a normal part of the scenery, one can readily understand the feelings of a homeowner facing a group of revelers pulling their boats onto the shore with the announced intention of picnicking in the front yard. The newly declared right of the public to enter private property for such purposes will not only

invade the property owners' privacy but will have obvious impacts on property values.

SUMMARY OF ARGUMENT

By the judgment below, California has abruptly reasserted its relinquished claim to lands lying between natural high and low water marks on Lake Tahoe. This was accomplished by concluding that, under concepts allegedly adopted by this Court in *Illinois Central Railroad Company v. Illinois*, 146 U.S. 387 (1892), the states were "powerless" to relinquish a "public trust" over such lands (*Lyon*, 29 Cal. 3d at 227)—a right which, as defined below, can only be viewed as the practical equivalent of a fee interest. Moreover, it must be assumed that federal lands, as well as private lands, are affected since the decision is premised on the basis of retained sovereign rights.

Serious questions of federal law are presented which should be reviewed by this Court. If California can do what it has done, every other state can do likewise. Property rights long since vested will be overturned. By opening these private lands to uses not embraced by original concepts of navigation, commerce, and fishing, the judgment below constitutes a radical, unforeseeable, and unanticipated extension of state authority. It is based on a perverse analysis of sovereign rights under the equal-footing doctrine and the effect is to deprive, in violation of the Due Process Clause of the Fourteenth Amendment, property owners of rights long since vested. And since the seizure is for public use, the Takings Clause of the Fifth Amendment, incorporated in the Fourteenth Amendment, is also invoked.

As for the holding below that lands located *above the natural high water mark* are also open to California's

"public trust" uses, the *process* by which petitioners were deprived of their rights deserves additional scrutiny. Here, clearly, preexisting property rights have been extinguished without regard to whether the property owners had *notice*, or any means of *obtaining notice*, that their properties were slowly but surely being taken by the State of California for "public trust" uses by the seasonal overflow of their lands by the federal government. This fact alone demonstrates that petitioners have been deprived of property without due process of law.

ARGUMENT

I

THE IMPOSITION OF CALIFORNIA'S PUBLIC TRUST DOCTRINE TO LANDS BETWEEN THE HIGH AND LOW WATER MARKS AT LAKE TAHOE HAS EFFECTIVELY TAKEN THESE LANDS FOR PUBLIC USE WITHOUT THE PAYMENT OF COMPENSATION

In *Barney v. City of Keokuk*, 94 U.S. 324 (1877), this Court concluded that the states were free to determine for themselves the boundaries of private lands fronting on inland navigable waters. The states were thus free to relinquish any claim below high water mark, subject only to the paramount right of navigation over the waters. This Court has consistently adhered to this view. *See Hardin v. Jordan*, 140 U.S. 371, 382-83 (1891); *Oregon ex rel. State Land Board v. Corvallis Sand and Gravel Company*, 429 U.S. 363, 374-75 (1977). As observed in *Lyon*, 29 Cal. 3d at 216, the states exercised these options differently; some states claimed only to low water, some to high water, and others made no claim whatever. California, by statute, is a low water state. Cal. Civ. Code § 830.

The California Supreme Court in *Lyon,* however, relying upon the decision of this Court in *Illinois Central,* concluded that any such recognition of private ownership was revocable and that the states are "powerless" to relinquish their rights as public trustee. *Lyon,* 29 Cal. 3d at 227. Accordingly, under the banner of the public trust doctrine, supported, according to the California Supreme Court, by this Court's holding in *Illinois Central,* the states are free to reassert rights in previously granted lands—rights which are so broad that they are, as noted earlier, the functional equivalent of a fee interest.

Illinois Central does not sanction such a result. The concern in *Illinois Central* was with an attempted alienation of the *permanently submerged* bed of Lake Michigan, action which would inevitably interfere with the navigational servitude. This Court's express concern was with the right of the people to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." *Illinois Central,* 146 U.S. at 452.

The problem with the reasoning below is that nothing in *Illinois Central* is inconsistent with the reasoning of *Barney v. Keokuk,* and the decisions of this Court which followed, holding that the states were free to relinquish all rights between high and low water marks save and except for those embraced by a *navigational* servitude. To say that *Illinois Central* authorizes a state 100 years later to reclaim the functional equivalent of a fee is to read into *Illinois Central* something which is simply not there. Moreover, any such conclusion, as a practical matter, renders the *Barney v. Keokuk* rule meaningless. Surely, it was not within the reasonable expectations of those who took title, or their successors, that such title could later be

revoked or reduced to a naked fee. The judgment below reads the law as playing a hoax on unsuspecting purchasers.

As stated by Justice Clark, dissenting in *Lyon*: "To impose the trust at this late date on all property within the shorezone so that the state may take it without payment is confiscation and constitutionally impermissible." *Lyon*, 29 Cal. 3d at 238.

See also Lyon v. Western Title Insurance Company, 178 Cal. App. 3d 1191 (1986), involving a subsequent unsuccessful claim against the title companies by affected property owners in *Lyon*. There the court agreed with a property owner's contention that *Lyon's* "innovative public trust doctrine . . . is bad law, unsupported by authority, violative of the separation of powers doctrine explicated by the state and federal Constitutions, and has taken his property for public use contrary to the state's Constitution." *Id.* at 1200.

It is submitted that the application of California's expanded public trust concept to lands above low water mark at Lake Tahoe constitutes a taking of private property without payment of compensation. The public is invited to enter. An owner's right of use is severely restricted. As observed by this Court in *Summa Corporation v. California, ex rel. State Lands Commission*, 466 U.S. 198, 205 (1984), an owner is left with little more than a "naked fee."[3]

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[3] In *National Audubon Society v. Superior Court*, 33 Cal. 3d 419, 440 n.22 (1983), the California Supreme Court, referring to *Fogerty I*, stated:

"By implication, however, the determination that the property was subject to the trust, despite its implication as to

(Continued on following page)

The fact that the taking has occurred as a consequence of a court decree, rather than by some administrative or legislative action, does not alter the result. This is not a case where the state court is adjudicating disputes between private parties.[4] This is a case where the state court has declared property open to *public use*. The Takings Clause of the Fifth Amendment, as incorporated into the Fourteenth Amendment, addresses the state *as an entity*. As stated in *Chicago, Burlington, & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 235 (1897):

> "If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment."

The judicial taking issue is comprehensively and persuasively presented in the petitions. The arguments therein need not be repeated here.

(Continued from previous page)

future uses and improvements, was not considered a taking requiring compensation."

Compare this Court's analysis in *Kaiser Aetna v. United States*, 444 U.S. 164, 172-73 (1979), stating:

> "[T]his Court has never held that the navigational servitude creates a blanket exception to the Takings Clause whenever Congress exercises its Commerce Clause authority to promote navigation. Thus, while Kuapa Pond may be subject to regulation by the Corps of Engineers . . . it does not follow that the pond is also subject to a public right of access."

[4] *Cf. Corporation of the Presiding Bishop v. Hodel*, 637 F. Supp. 1398 (D.D.C. 1986).

II

THE EXTENSION OF THE PUBLIC TRUST DOCTRINE LANDWARD OF THE NATIONAL HIGH WATER MARK HAS ALSO VIOLATED PETITIONERS' CONSTITUTIONAL RIGHTS

A. The Finding of a Prescriptive Easement in Favor of the State, Based upon a Use by the Federal Government, Constitutes a Taking of Property for State Purposes Without Compensation

Referring to property above the natural high water mark and the effect thereon of the federal government's dam, the court below stated:

> "Lands were inundated which, before statehood, had belonged to the littoral owners free of the public trust." *Fogerty II*, 187 Cal. App. 3d at 230.

The court then held that the inundation by the federal government gave the state the right to impose its public trust easement on those lands. The legal theory was that adverse use by the federal government created prescriptive rights for different uses on behalf of the state. The result is an appropriation of property for state use based upon a theory of adverse use even though there was no adverse use by the state.

The adoption of such an arbitrary and unexpected rule of property law constitutes a judicial taking. *See, e.g., Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Petitioners have persuasively argued this point and further elaboration is not required here.

B. The Adoption of a Rule of Law Which Results in a Forfeiture Without Adequate Notice and Opportunity to Take Protective Action Deprives a Person of Property Without Due Process of Law

There can be no question but that the use of petitioners' properties by the federal government for water storage purposes involved the taking of an interest *by the federal government.* In 1957, the California Attorney General specifically found that the doctrine of laches as well as the applicable period of limitations precluded affected property owners at Lake Tahoe from pursuing a claim against the federal government. 30 Op. Att'y Gen. 262, 271-72 (1957). The opinion concluded that a taking had occurred "in the nature of a flowage easement, an easement for intermittent flooding." *Id.* at 271. There was no hint, however, that the rights of the property owners were otherwise affected.

Nevertheless, the court below concluded that the mere presence of water on private property, backed up by a government dam, will convert the ownership to public use solely as a consequence of the passage of time. Such a result cannot be permitted to stand.

The finding of an easement in favor of the public, based upon a use which does not impart knowledge of the nature and extent of the easement being claimed, is inequitable, confiscatory, and deprives the affected owners of their property without due process of law.

Such a rule also can only lead to unnecessary conflicts between the affected parties. The dilemma presented can be simply put: When the federal government builds a dam for water storage purposes, or raises waters behind an existing dam to new levels, must the affected

property owners pursue a claim against the federal government, the state government, or both, not just with respect to the occasional overflow (to which they may not object), but also for the loss that ultimately will result from the imposition of a public trust easement should they fail to take such action?

Applied prospectively, the rule adopted below is a trap for the unwary and stirs up litigation by those who may have learned of the novel rule and who thus appreciate the necessity of pursuing a claim against someone in order to preserve their property.

Applied retrospectively, to the property owners at Lake Tahoe, the result is outright confiscation.

The entire foundation of the concept underlying prescriptive easements is premised upon an adverse use *which imparts knowledge as to the nature and extent of the claim being made. See Restatement of Property* § 458, Comment to Clause (c) (1944), which states in part:

> "The requirement that, to be adverse, a use must be open and notorious is for the protection of those against whom it is claimed to be adverse. It enables them to protect themselves against the effect of the use by preventing its continuance."

The forfeiture of property rights as a consequence of adverse use is based upon a limitation of actions concept. A property owner who sits on his rights while his land is openly invaded by another ultimately loses his right to contest the entry. And the intruder will obtain a right to continue the intrusion.

Thus, in the early case of *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457 (1831), this Court recognized that where one party is actually making use of the property of

another, the other may, with the passage of time, lose his right to challenge the use. This Court said:

> "Such laws have frequently passed in review before this Court; and occasions have occurred in which they have been particularly noticed as laws not to be impeached on the ground of violating private right. What right has anyone to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Id.* at 466.

A different result must, however, necessarily follow where a property owner is stripped of property where it has never been entered and occupied, where there has never been an adverse claim of the nature being asserted here, and thus where there has been no notice of such a claim being made.

In *Texaco, Inc. v. Short,* 454 U.S. 516 (1982), this Court reviewed an Indiana statute which provided that a severed mineral interest would be extinguished if unused for a period of 20 years unless the mineral owner filed a claim prior to the end of the 20 year period or within a 2 year grace period following enactment of the statute. The issue was whether the statute imparted adequate notice and opportunity to affected mineral owners to take effective action to protect their interests. In a five-to-four decision, the majority held that the Indiana law provided such adequate notice and opportunity. However, had it not been for the finding of adequate statutory notice and the two year grace period, there is little question but that the majority would have joined the dissent.

The dissent, authored by Justice Brennan, stated the issue in a manner that could be applied word for word to the instant situation by merely substituting the word "California" for the word "Indiana" and the word "petitioners" for the word "appellants":

> "The question presented here is simply whether the State of Indiana has deprived these appellants of due process of law by extinguishing their pre-existing property interest without regard to whether they knew, and without providing any meaningful mechanism by which they might have learned, of the imminent taking of their property or their obligations under the law." *Texaco, Inc.*, 454 U.S. at 540.

Justice Brennan went on to observe:

> "If Indiana were by simple fiat to 'extinguish' all pre-existing mineral interests in the State, or to transfer those interests to itself, to surface owners, or indeed to anyone at all, that action would surely be unconstitutional and unenforceable—at least absent just compensation." *Id.* at 542.

Finally, it was noted:

> "Property owners have historically been allowed to rest easy in the knowledge that their holding is secure, absent some affirmative indication to the contrary; to rely on the general practice that '[n]otice is required before property interests are disturbed.' " *Id.* at 547.

There is nothing in the majority opinion inconsistent with the views of Justice Brennan as to whether some kind of notice was required. The majority merely concluded that, under the Indiana law involved, adequate notice had been given. In the instant situation, however, *no notice was given.* Paraphrasing from Justice Brennan's analysis, as applied to the situation at Lake Tahoe, one can only conclude that "an average citizen would have no reason to regard the triggering event [*i.e.*, federal flooding] as calling for a heightened awareness of one's legal obligations [to protect against a future state claim permitting dry land intrusions]." *Id. See also Hodel v. Irving,* 55 U.S.L.W. 4653, 4657 (May 18, 1987) (Stevens, J., concurring).

The inequity at Lake Tahoe is even more pronounced, however, because only a few years before the alleged "prescriptive" period began to run, the California Attorney General in an opinion published at 43 Op. Att'y Gen. 291 (1964) expressly found that the boundaries of a nontidal navigable lake or river are "to be established according to its last natural elevation, *not affected by artificial influences, such as dams or locks.*" *Id.* at 297 (emphasis added). The opinion further emphasized that this rule has been adhered to "even though the artificial influences were dams and locks constructed by the Federal Government." *Id.*[5]

In short, the periodic overflow caused by the federal dam not only failed to give notice of a potential state claim, but the State of California, three years before the prescriptive period began, actually disavowed any such claim. It would be hard to find a clearer case involving lack of due process.

III

THIS CASE IS RIPE FOR REVIEW

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), demonstrates that the petitions for certiorari filed in this Court after *Fogerty I* were premature. Further proceedings were contemplated. The judgment was not final. No

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[5] The opinion did recognize that riparian or littoral owners, who have made substantial expenditures on improvements in reliance on artificial changes caused by another, may be able to enjoin the other from altering the artificial condition. The theory is estoppel. But that rule has no application here. The opinion repeatedly stressed that this was a theory available to the riparian or littoral owner against the party making the change. The littoral owners here have not altered natural levels and there are no state improvements made in reliance on any littoral owner actions which would support a theory of estoppel against the owners.

determination had been made as to *how* the federal government's use of Lake Tahoe as a reservoir would affect the quantity of land to be claimed by the state.[6] As argued by the California Attorney General in its opposition to the earlier petitions, "issues respecting the location of high and low water lines remain to be tried on remand to the state trial court." Respondent's brief in opposition at 4. However, if the decision below is left standing, the judgment will be final and will have been *applied* to specifically identified property lying below an elevation of 6228.75 feet thus meeting the *Williamson* standard.

No further action by state officials will be required before the petitioner's property rights are defeated. California's public trust doctrine is self-actuating. Rights inure directly in the members of the public. *See Marks v. Whitney*, 6 Cal. 3d 251, 261 (1971), where it was held that members of the public may not be barred from asserting or exercising public trust rights on privately owned lands subject to the trust. As stated in *Summa Corporation*,

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[6] This was resolved in *Fogerty II*, 187 Cal. App. 3d at 239: "The need for water storage . . . fluctuates from season to season and ultimately from year to year. We believe it wholly unnecessary to the doctrine of prescription for water impounded behind a dam to remain in place continuously for the five-year period in order for prescriptive rights to attach. Practical experience tells us no reservoir operates that way. We believe, instead, that the needs of the reservoir operator are determinative. [Citation omitted.] Where the reservoir operator returns the waters to a zenith each water year and maintains the water at that elevation for the duration of his needs his use of the reservoir is 'continuous' up to and including that highest point. . . . For purposes of the public trust doctrine, we shall therefore set the high watermark of Lake Tahoe at the highest elevation actually reached by the 'current' lake in five sequential years."

466 U.S. at 205, the landowner is left with "little more than naked fee" because any private use "remains subject to the right of the State *or any member of the public* to assert the State's public trust easement." (Emphasis added.)

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CONCLUSION

At least two fundamental infirmities led up to the judgment below which resulted in a violation of petitioners' property rights guaranteed by the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments.

The first is the assumption that this Court's holding in *Illinois Central* authorized the imposition of California's public trust concept to lands lying between the high and low water marks of inland navigable waters. The declaration below to this effect not only raises a serious question of federal law under the equal-footing doctrine but, if allowed to stand, will result in a taking of private property without compensation.

The second infirmity involves the holding below that periodic submergence of littoral lands due to the regulation of a dam by the federal government's watermaster during the years 1967 through 1971 has resulted in a prescriptive easement in favor of the state authorizing a wide variety of public uses. These include picnicking, hunting, and hiking. However, to reach such a result, in conformity with due process requirements, the court below also would have had to conclude that the periodic submergence somehow put the property owners on *notice* that these newly authorized activities could now take place on their properties during those times of the year when they are not submerged. The court also would have had to conclude

that the property owners sat on their rights, that they should then and there have sued the federal government and the State of California under some theory of action, and that, in failing to do so, they forfeited their rights under concepts of adverse use.

It is respectfully submitted that no such notice was generated and no such causes of action accrued. If allowed to stand, this holding will result in a taking without compensation. It additionally violates fundamental due process guarantees.

For the reasons stated above, it is respectfully requested that the petitions for certiorari be granted.

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Respectfully submitted,

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